93-563

No. _____

Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1993

GARY STRATEMEYER,

Petitioner,

v.

LINCOLN COUNTY and MACO WORKERS' COMPENSATION TRUST,

Respondent.

Petition For Writ Of Certiorari To The Montana Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is Petitioner's constitutional right to equal treatment under the law violated by the Montana Workers' Compensation Act's exclusion of mental injuries without a physical component?

2. Did the Montana Supreme Court fail to apply traditional equal protection doctrine by not requiring the state to show a legitimate government interest for the discriminate treatment?

LIST OF ALL PARTIES TO THE PROCEEDING

The names of the parties are set forth in the caption of the case.

Because the constitutionality of a state statute is involved 28 U.S.C. § 2403 (b) may apply, so the Petition shall be served on the Attorney General of the State of Montana.

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LINCOLN COUNTY and MACO WORKERS' COMPENSATION TRUST,

Respondent.

Petition For Writ Of Certiorari To The Montana Supreme Court

PETITION FOR WRIT OF CERTIORARI

Gary Stratemeyer, the Petitioner herein, respectfully prays that a Writ of Certiorari issue to review the judgment of the Montana Supreme Court entered June 23, 1993, and order denying rehearing entered July 16, 1993.

OPINIONS BELOW

The June 23, 1993, opinion of the Montana Supreme Court, whose judgment is herein sought to be reviewed is reported at 855 P.2d 506, and is reprinted in Appendix A to this Petition. The Montana Supreme Court's July 16, 1993, order denying rehearing is not reported but is reprinted in Appendix C to this Petition. The prior judgment of the Montana Worker's Compensation Court is reprinted in Appendix B and is reported at WCC Vol. XIII, No. 930, and the Montana Worker's Compensation Court's order denying rehearing is reprinted in Appendix D to this Petition, and is not reported.

JURISDICTIONAL STATEMENT

The judgment of the Supreme Court of Montana was entered on June 23, 1993. A timely motion for rehearing was subsequently filed and denied by the Montana Supreme Court on July 16, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the first section of the Fourteenth Amendment to the Constitution of the United States, which

provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. (emphasis added)

This case also involves Article II, Section 4 of the Constitution of the State of Montana, which states:

> The dignity of the human being is inviolable. No person shall be denied equal protection of the laws. Neither the State nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.

The Worker's Compensation Statute at issue [Section 39-71-119, MCA (1987)] provides:

> **Injury and accident defined.**
> (1) "Injury" or "injured" means:
> (a) internal or external physical harm to the body;
> (b) damage to prosthetic devices or appliances; except for damage to eyeglasses, contact lenses, dentures, or hearing aides, or;

(c) death.

(2) An injury is caused by an accident. An accident is:

(a) an unexpected traumatic incident or unusual strain;

(b) identifiable by time and place of occurrence;

(c) identifiable by member or part of the body affected; and

(d) caused by a specific event on a single day or during a single work shift.

(3) *"Injury" or "injured" does not mean a physical or mental condition arising from:*

(a) emotional or mental stress; or

(b) a nonphysical stimulus or activity.

(4) "Injury" or "injured" does not include a disease that is not caused by an accident.

(5) A cardiovascular, pulmonary, respiratory, or other disease, cerebrovascular accident, or myocardial infarction suffered by a worker in an injury only if the accident is the primary cause of the physical harm in relation to other factors contributing to the physical harm. (emphasis added)

The Statute describing the Public Policy of the Montana Worker's Compensation Act [Section 39-71-105, MCA (1987)] reads as follows:

Declaration of Public Policy. For the purpose of interpreting and applying Title 39, chapters 71 and 72, the following is the public policy of this state:

(1) *It is an objective of the Montana Workers' Compensation system to provide,*

without regard to fault, wage supplement and medical benefits to a worker suffering from a work-related injury or disease. Wage-loss benefits are not intended to make an injured worker whole; they are intended to assist a worker at a reasonable cost to the employer. Within that limitation, the wage-loss benefit should bear a reasonable relationship to actual wages lost as a result of a work-related injury or disease.

(2) *A worker's removal from the work force due to a work-related injury or disease has a negative impact on the worker, the worker's family, the employer, and the general public. Therefore, it is an objective of the workers' compensation system to return a worker to work as soon as possible after the worker has suffered a work-related injury or disease.*

(3) Montana's workers' compensation and occupational disease insurance systems are intended to be primarily self-administering. Claimants should be able to speedily obtain benefits, and employers should be able to provide coverage at reasonably constant rates. To meet these objectives, the system must be designed to minimize reliance upon lawyers and the courts to obtain benefits and interpret liabilities.

(4) Title 39, chapters 71 and 72, must be construed according to their terms and not liberally in favor of any party. (emphasis added)

STATEMENT OF THE CASE

Origin of Action

Petitioner served as a law enforcement officer in Lincoln County for approximately eight (8) years and enjoyed a distinguished reputation until he suffered a disabling injury during the performance of his duty. Petitioner's injury arose out of events on May 4, 1990, when he was dispatched to a residence where a young girl had attempted suicide. Arriving on the scene, Petitioner found a 17 year old girl with a gun shot wound to her head, being held closely by her father. The girl was still alive. In an effort to rescue the girl, Petitioner was forced to physically remove her from her father's arms. He performed CPR and held the dying girl until the ambulance arrived. Before Petitioner's shift ended, he learned the girl had died.

Petitioner immediately began having troubles functioning at work and at home. He became totally pre-occupied with the call. He criticized himself for not saving the girl's life and for depriving her father of the last moments of her life. He suffered flashbacks of the suicide scene, became physically disoriented, and had other problems culminating in hospitalization approximately two (2) weeks after the incident. He was subsequently diagnosed with Post Traumatic Stress

Disorder caused by the rescue attempt and is totally disabled.

The insurer, Montana Association of Counties Workers' Compensation Trust/Lincoln County (MACO), concedes Petitioner's total disability is an injury caused by the rescue attempt, but Worker's Compensation benefits were denied because Montana Statute, § 39-71-119 (3) MCA, specifically excludes mentally caused mental injuries from coverage.

Raising of Federal Question

Petitioner brought the claim dispute before the Montana Worker's Compensation Court and raised the issue of the constitutionality of § 39-71-119 (3) at the pre-trial conference. The constitutional issue was set forth in the Pre-trial Order as noted in the Worker's Compensation Court's Opinion (Appendix B at page B-2 - B-4) and in its Order on Rehearing (Appendix D at page D-7). The case was presented at Trial on February 10, 1992 before the Worker's Compensation Court.

The Montana Worker's Compensation Court held the statutory exclusion of Petitioner's injury violated his right to "equal protection of the law", and violated the Montana Constitution. (Appendix B at page B-56) In its Order Denying a Rehearing, the Worker's Compensation Court clarified its judgment that the exclusion was unconstitutional:

> This in essence reflects the actual discrimination established by the classification resulting from

> § 39-71-119 (3), MCA, as it excluded "stress" claims from coverage. The initial judgment concluded that this unequal treatment, or in the language of the constitution, unequal protection, violated Petitioner's constitutional right to be treated equally by the State. In reaching this conclusion, the Court applied long standing principals of constitutional law. That is, that where a citizen is denied protection of the law, at a bare minimum, he is entitled to know why. Against the enormous power of the State, its citizens have but one source of protection or means to keep government in check. That is the Constitution and its Bill of Rights.

(Appendix D at page D-13 & D-14)

MACO appealed the Worker's Compensation Court's decision to the Supreme Court of Montana but narrowly framed the issue as whether the Worker's Compensation Court erred when it held that § 39-71-119 (3), violated the Montana Constitution.[1] The Montana Supreme Court reversed the

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[1] It was not in Petitioner's interest to appeal the Workers' Compensation Court's order. Respondent appealed and reframed the issue in a more limited way, as to whether the lower court erred when it found the statute violated the Montana Constitutional guarantee of equal protection of the laws. The Montana Supreme Court reversed the Workers' Compensation Court, holding that the statute did not violate the Montana Constitution. In its opinion, the Montana Supreme Court referred to United States Supreme Court cases (Appendix A at page A-9, A-11, A-13, A-14), and it is clear that the Montana Supreme Court believed federal law compelled its conclusion. In any event, the Montana Supreme Court did not indicate that the Montana Constitutional Equal Protection Clause is separate, apart and

lower court's judgment that the statute was unconstitutional. Petitioner timely filed a Petition for Rehearing to the Montana Supreme Court, which was denied.

(Appendix C at page C-1)

REASONS FOR GRANTING THE WRIT

I.

THE STATUTE DENYING COVERAGE TO MENTALLY INJURED WORKERS IS DISCRIMINATORY ON ITS FACE

This case concerns the rights of certain mentally injured workers to qualify for worker's compensation coverage of their medical bills and lost wages. A provision of the 1987 Montana Worker's Compensation Act, § 39-71-119 (3), excludes from coverage those employees who can not show a physical component to their injuries.

Petitioner alleges, and his employer agrees, he would be entitled to receive money to pay his medical expenses caused by the injury and other benefits under the Worker's Compensation Act except for the exclusion. But, despite

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distinct from the Federal Equal Protection Clause. It is clearly interwoven. Accordingly, the decision does not rest on an adequate and independent state grounds. Furthermore, the Montana Equal Protection Clause is similar to if not identical in concept to the United States Equal Protection Clause. Cottrill v. State Compensation Mutual Insurance Fund, 299 Mont. 40, 744 P.2d 895 (1987); and Madison v. Yunker, 180 Mont. 54, 584 P.2d 126, 129 (1978).

Petitioner's ability to prove beyond doubt he met all the criteria for an injured worker to receive compensation, he was denied coverage.

The classification is clearly posed. Petitioner proved he was injured due to a work related event, a failed rescue attempt of a teenager suffering a self-inflicted gunshot wound to her head, but he is denied Workers' Compensation coverage because he lacks a "physical" component to his injury. The 1987 legislation did not exclude any physical injuries and it did not exclude all mental injuries; only those mental injuries without an accompanying physical component. Had Petitioner also injured his back while carrying the victim to the ambulance, he would be entitled to coverage for his medical expenses and wage loss benefits for his injured back and his Post Traumatic Stress Disorder. However, since he could not show a broken bone, or other so called "physical injury", he is denied all benefits for his Post Traumatic Stress Disorder.

Petitioner claims that such disparate treatment by the State is unconstitutional and the Worker's Compensation Court agreed. The Montana Supreme Court reversed after departing from the required equal protection analysis and sustained the statutory exclusion.

II.

THE COURT BELOW FAILED TO APPLY REQUIRED STANDARD OF REVIEW TO A DISCRIMINATING STATUTE

The Fourteenth Amendment does not prohibit disparate treatment. But, when brought to the attention of a court, disparate treatment triggers some analysis to determine if such unequal treatment is constitutional. Specifically, when a state distributes benefits unequally, the distinctions it makes are subject to review under the equal protection clause of the Fourteenth Amendment. *Zobel v. Williams, 457 U.S. 55 (1982).* As this Court re-stated in *Eisenstadt v. Baird, 405 U.S. 438, 447 (1971);*

> The Equal Protection Clause of that Amendment does, however, deny States the power to legislate that different treatment be accorded to persons placed by a statute in different classes on the basis of criteria wholly un-related to the objective of that statute. A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.

(Citations omitted)

The minimal standard of review is normally accorded economic and social legislation. Cleburne v. Cleburne Living

Center, Inc., 473 U.S. 432, 440 (1985).

The minimal standard of review may give way to a higher standard when a statute affects a suspect class. *Id.* Although Petitioner is not in a suspect class he is in a sensitive group which has been subject to historical prejudice.[2]

In *Cleburne* , Justice Stevens' concurring opinion noted that a tradition of prejudice against the mentally disabled justified careful scrutiny of a zoning board's action. *Id.* at 450. Specifically he states:

> The Court must be especially vigilant in evaluating the rationality of any classification involving a group that has been subjected to a tradition of disfavor [for] a traditional classification is more likely to be used without pausing to consider its justification than is a newly created classification.

Id. at 453 n.6

The sensitive nature of the classification in this case, the extent of Petitioner's disability, the State of Montana's complete denial to him of any wage loss benefits or medical services, warrants at the minimum, a meaningful and exacting rational basis review.

The test the Montana Supreme Court should have

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[2] Congress has found that society has tended historically to isolate and segregate persons with mental disabilities and such discrimination continues to be a serious and pervasive social problem. 42 U.S.C.S. § 12101.

conducted was whether the classification, excluding mental injuries without a physical component from worker's compensation coverage, is "reasonable, not arbitrary, and rests upon some ground of difference having a fair and substantial relationship to the object of the legislation, so that all persons similarly circumstanced be treated alike. *Reed v. Reed, 404 U.S. 71, 76 (1971).*

A. No Legitimate Reason.

Simply, what is the state's justifiable reason for taking care of workers with physical injuries and workers with physical injuries and mental injuries, but not workers with mental injuries only?

The statute at issue, § 39-71-119, MCA, fails to disclose the reasons for the disparate treatment.

Nor are the reasons apparent from reading the public policy statute of the Worker's Compensation Act. The public policy is set forth in § 39-71-105, MCA, which states in relevant part:

> ... It is an objective of the Montana Worker's Compensation System, to provide, without regard to fault, wage supplement and medical benefits to a worker suffering from a work-related injury or disease...
>
> A workers removal from the work force due to a work-related injury or disease has a negative impact on the worker, the worker's

> family, the employer, and the general public. Therefore, it is an objective of the workers' compensation system to return a worker to work as soon as possible after the worker has suffered a work-related injury or disease.

This Court considered the overall purposes of a Louisiana Worker's Compensation Act when it struck down a law which provided less benefits to illegitimate children compared to legitimate children. *Weber v. Aetna Casualty and Surety Co., 406 U.S. 164 (1972).* This Court held the different treatment bore no significant relationship to those recognized purposes for which worker's compensation statutes serve. *Id.* It is not evident from its opinion that the Montana Supreme Court majority recognized the purpose for Montana Workers' Compensation. However, it is clear that the public policy as defined by statute is thwarted by denying coverage to Petitioner, who suffers from a totally disabling work-related injury which has had a real and negative impact on his employer, his family, himself, and society.

Reasons for the exclusion are not apparent in either the legislation or in the legislative history. Lacking legislative reason, the court then deserted the traditional equal protection requirement that the state show a legitimate governmental interest for discriminate treatment and in one fell swoop gutted the rational basis test by stating it is unnecessary for a

legislative purpose to exist.

> The purpose of the legislation does not have to appear on the face of the legislation or in the legislative history, but may be any possible purpose of which the court can conceive. In this case, the Worker's Compensation Court expected the legislature to provide the purpose. This, however, is not required of legislation being examined relative to equal protection.

(Appendix A at page A-9)

The crucial problem with the Montana Supreme Court's approach is explained by Justice Treiweiler in his dissent:

> According to the majority opinion, the only limit on the Legislature's authority to draw arbitrary classifications among its citizens is the creative ability of the majority of justices on this Court. If the majority can imagine some speculative but unsubstantiated basis for discriminating among Montana's citizens, then it is okay for the Legislature to do so. Under this standard, the notion of equal protection in our Constitution is truly illusory.

(Appendix A at page A-20)

B. No Rational Relationship To Any Purpose.

The majority adopted the reasons promoted by Respondents to justify the discriminating treatment. The major reason, according to the majority, for the disparate treatment is cost savings to Montana employers. The reliance on cost savings as a rational reason for the exclusion is misplaced.

Cost savings is never, in itself, a sufficient reason to discriminate against a particular class of citizens. Problems of the fisc are legitimate concerns of government but government may not accomplish such a purpose by invidious distinctions between classes of its citizens. *Shapiro v. Thompson, 394 U.S. 618, 633 (1969).*

Regardless of whether cost savings is a rational basis, there is no evidence that excluding mental injury would provide such savings. The Workers' Compensation Court had already considered and rejected cost savings as a reason based on the legislative history.

> There is not a scintilla of fact, statistical or otherwise, to demonstrate any actual cost or cost savings associated with the broad brush of exclusion brought by this legislation.

(Appendix B at page B-51).

The other reason the Court cited for justifying the exclusion is the difficulty with proving these types of claims. (Appendix A at page A-12) That reason is not at all rationally related to the exclusion of Petitioner who easily proved his injury. The Montana Supreme Court stated: "There are problems with mental stress claims and they have caused reluctance in some states to compensate for these claims." (Appendix A at page A-12) The fact some states distrust mental injuries and are reluctant to treat them as physical

injuries is not a sufficient reason to continue the tradition of discrimination.

The Worker's Compensation Court commented on courts lingering distrust of psychological claims:

> Insofar as work-relatedness in the no-fault-concept of Worker's Compensation, our social and cultural reluctance to equate "mental" conditions to true disability is deeprooted. Few people question the severity of broken bones or severed limbs because we can see it, x-ray it, or stitch it. Yet, there is reluctance to accept conditions which lack the objective measurement of such instruments as an x-ray.

(Appendix B at page B-54)

The mind is part of the total body and not separate from it. However, a minority of states continue to draw an artificial line between the mind and the body and refuse to recognize the reality of an injury without a physical component.[3] An injury

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[3] There remains a minority of jurisdictions which do not afford mental injuries the same status as physical injuries.

A conflict exists between the federal government and between the several states in the way mental-mental injury is treated under the workers' compensation laws of each jurisdiction. The federal government has long recognized mental-mental injuries as compensable under the Longshore Workers' Compensation Act, see, *American National Red Cross v. Hagen, 327 F. 2d 559 (7th Cir. 1964).* Thus, under the federal scheme a worker who suffers a mental injury because of on-the-job stress is treated equally with workers who suffer physical injury and they are compensated for their injury.

Among the states the trend is to compensate mental-mental injuries within the Worker's Compensation System. 1B *Larson, Worker's*

is an injury. Indeed a broken mind may be more disabling than a broken arm or leg.

In Cleburne, this Court held that the record did not reveal any rational basis for requiring a special use permit for a proposed group home for mentally retarded persons but the special requirement appeared to rest on an irrational prejudice against mentally retarded persons. *Cleburne, 473 U.S. at 447-450.*

As the Court in Cleburne noted:

> Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. *Cleburne at 448, citing Palmore v. Sidoti, 466 U.S. 429, 433 (1984).*

The Cleburne city counsel raised several concerns about the group home. This Court noted those concerns but stated: "The question is whether it is rational to treat the mentally retarded differently." *Id.* at 449, The Court answered:

The short of it is that requiring the permit in

Compensation Law, § 42.25 (1993). Currently, twenty-nine states compensate mental-mental injuries under their Workers' Compensation laws. *Id. at § 42.25 (c).*

In contrast, a minority of states have expressly excluded the workers who suffer a mental-mental injury for compensation within their law. *Larson, § 42.25 (d).* Currently, eight states, including Montana, have chosen to treat these injured workers differently and exclude them totally from coverage.

> this case appears to rest on an irrational prejudice against the mentally retarded...

Id. at 450.

Likewise, the Montana Supreme Court has sustained legislation which draws an arbitrary classification for reasons which appear to be based on an irrational prejudice against mentally injured workers. The basis of the classification does not rationally connect with either governmental purpose cited by the Montana Supreme Court.

The impact of this case to Petitioner, and others similarly situated, is devastating. Unlike all other Montana workers, they are denied medical coverage and wage loss benefits for their work-related injuries. Additionally, the impact of the case adversely affects all Montana citizens because, the Court's misapplication of traditional equal protection analysis renders the equal protection clause meaningless. In short, the decision, as stated by one of the dissenting justices:

> sounds the death knell for this critical constitutional protection which powerless people have traditionally relied on Courts to enforce.

(Appendix A at page A-16)

CONCLUSION

WHEREFORE, Petitioner respectfully prays that a Writ of Certiorari issue from this Honorable Court to review the judgment of the Supreme Court of Montana, in *Stratemeyer v. Lincoln County and MACO Workers' Compensation Trust.* In the event that the Petition is granted, Petitioner prays the judgment of the Montana Supreme Court be reversed.

Respectfully submitted,

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APPENDIX A:

OPINION OF THE MONTANA SUPREME COURT DATED JUNE 23, 1993

No. 92-376

IN THE SUPREME COURT OF THE STATE OF MONTANA

1993

GARY STRATEMEYER,

Claimant and Respondent,

v.

LINCOLN COUNTY, (Filed June 23, 1993)

Employer,

and

MACO WORKERS' COMPENSATION TRUST,

Defendant and Appellant.

APPEAL FROM: The Montana Workers' Compensation Court
The Honorable Timothy Reardon, Judge presiding.

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Submitted: December 16, 1992

Decided: June 23, 1993

Filed:

/s/ Ed Smith
Clerk

Justice R. C. McDonough delivered the Opinion of the Court.

This is an appeal from an order of the Worker's Compensation Court, concluding that subsections (3)(a) and (b) of Section 39-71-119, MCA (1987), violate Article II, Section 4 of the Montana Constitution. We reverse.

The sole issue on appeal is whether the Workers' Compensation Court erred in concluding that subsections (3)(a) and (b) of Section 39-71-119, MCA, violate Article II, Section 4 of the Montana Constitution, which states ... "[n]o person shall be denied the equal protection of the laws ... "

Gary Stratemeyer (Stratemeyer) was a deputy sheriff for Lincoln County from 1982 to 1990. On May 4, 1990, Stratemeyer was called by the Sheriff's dispatcher to respond to a suicide attempt near the Libby office. When he arrived at the home, he was led to a back bedroom where he found a 17 year old girl being held by her father. She had shot herself in the head but was still alive. Respondent took the girl from her father's arms and administered first aid, including cardiopulmonary resuscitation, until the ambulance arrived.

When the ambulance arrived, the respondent helped the crew carry her to the ambulance. He then served as an escort for the ambulance to the hospital where he learned the girl had died. He was then called away from the hospital to another

accident scene.

Thereafter, the respondent was continually plagued by thoughts of the girl's suicide. A few weeks after the suicide, the respondent took sick leave because of anxiety over the event. He continued to suffer anxiety problems and was unable to return to work. Stratemeyer submitted a claim for Workers' Compensation on May 25, 1990, for a mental stress injury suffered during his employment as a police officer. The claim was denied on the basis that he had not suffered a "compensable injury" as defined by statute. (Statutory law prohibits coverage for a mental (stress) injury suffered without a physical component.) He then petitioned for a hearing before the Workers' Compensation Court for coverage of his medical costs and lost wages.

That court concluded that he did not suffer a "compensable injury" within the language of Section 39-71-119, MCA. The Workers' Compensation Court also determined that this statute violated respondent's right to equal protection of the law because "claimant has been denied compensation based on the nature of his disability without regard to its cause as being work-related." Respondent contended, and the Workers' Compensation Court concluded, that the statute at issue was unconstitutional because it violated equal protection of the law.

There are limitations governing a court's ability to declare

a statute unconstitutional. We take cognizance of the following cautions:

> [I]t is our sacred duty to measure the Act by the terms of our constitutional limitations, as we interpret them. "It must be evident to anyone that the power to declare a legislative enactment void is one which the judge, conscious of the fallibility of the human judgment, will shrink from exercising in any case where he can conscientiously and with due regard to duty and official oath decline the responsibility. The legislative and judicial are co-ordinate departments of the government of equal dignity; each is alike supreme in the exercise of its proper functions, and cannot directly or indirectly while acting within the limits of its authority be subjected to the control or supervision of the other without an unwarrantable assumption by that other of power which, by the Constitution, is not conferred upon it. The Constitution apportions the powers of governments but it does not make any one of the three departments subordinate to another when exercising the trust committed to it. The courts may declare legislative enactments unconstitutional and void in some cases, but not because the judicial power is superior in degree or dignity to the legislative. Being required to declare what the law is in the cases which come before them, they must enforce the Constitution as the paramount law, whenever a legislative enactment comes in conflict with it."

State v. Dixon (1923), 66 Mont. 76, 84-85, 213 P. 227, 229.

Additionally:

> When a legislative course of action expressed in statutes or budgetary laws is tested for constitutionality under the State Constitution, our review is circumscribed by certain principles. We must give the state constitutional provision a broad and liberal construction consistent with the intent of the people adopting it to serve the needs of a growing state. The constitutional provision should receive a reasonable and practical interpretation in accord with common sense. The constitutionality of a legislative enactment is prima facie presumed, and every intendment in its favor will be presumed, unless its unconstitutionality appears beyond a reasonable doubt. The question of constitutionality is not whether it is possible to condemn, but whether it is possible to uphold the legislative action which will not be declared invalid unless it conflicts with the constitution, in the judgment of the court, beyond a reasonable doubt.

Fallon County v. State (1988), 231 Mont. 443, 445-46, 753 P.2d 338, 339-340. (Citations omitted.) Every possible presumption must be indulged in in favor of the constitutionality of the Act. See State v. Safeway Stores, Inc. (1938), 106 Mont. 182, 199, 76 P.2d 81, 84.

With these principles in mind, we turn to the standard of review for Workers' Compensation cases challenging a

statute on the basis of equal protection. We have enunciated the following:

> [T]he right to receive Workers' Compensation benefits is not a fundamental right which would trigger a strict scrutiny analysis of equal protection. Nor does this statute infringe upon the rights of a suspect class.
>
> When a right determined to be less than fundamental is infringed upon by classification, the test applied by this Court is the rational relationship test. That is, does a legitimate governmental objective bear some identifiable rational relationship to a discriminatory classification.

Cottrill v. Cottrill Sodding Service (1987), 229 Mont. 40, 42-43, 744 P.2d 895, 897 (Citations omitted). In other words, is the classification (means) used to accomplish a legitimate governmental objective rational? The statute at issue here, because it affects no fundamental right or suspect class, must be analyzed under the rational basis test.

Section 39-71-119, MCA, excludes from the definition of injury work-related injuries that do not have a physical component. Section 39-71-119, MCA, reads as follows:

> (1) "Injury ... means:
> (a) internal or external physical harm to the body.
> ...
> (3) "Injury" or "injured" does not mean a physical or mental condition arising from:
> (a) emotional or mental stress; or

(b) a non physical stimulus or activity.

The Workers' Compensation Court concluded that the respondent's injury was not covered under Section 39-71-119, MCA, because it was a mental injury. The Workers' Compensation Court further concluded that the statute was unconstitutional because it improperly excluded people with mental injuries with no physical component from compensation under the Workers' Compensation Act in violation of equal protection of the law. In applying the rational basis test to the exclusion for above conditions without a physical component, the Workers' Compensation Court stated that "[i]f a rational basis exists for the classification created by section 39-71-119, MCA (1987), the legislature must provide it. The Court may not speculate to find it." The court concluded that the classification did not meet the rational basis test because it could glean no purpose for the legislation from the statute itself or its legislative history.

However, appellant argues that the Workers' Compensation Court should have sought "any combination of purposes that the Legislature might have been attempting to achieve" in enacting Section 39-71-119, MCA. The Ninth Circuit has stated: "[i]n our review of governmental purposes,...we need not rely only upon those purposes the legislature, litigants, or district court have espoused, but may also consider any other

rational purposes possibly motivating enactment of the challenged statute." Mountain Water v. Mont. Dept. of Public Serv. Reg. (9th Cir. 1990), 919 F.2d 593, 597. See also; Kadrmas v. Dickinson Public Schools (1988), 487 U.S. 450, 462-463, 108 S.Ct. 2481, 2490, 101 L.Ed.2d 399; Cottrill v. Cottrill Sodding Service (1987), 229 Mont. 40, 43, 744 P.2d 895, 897; ([a]lthough this Court could speculate as to why the legislature elected to treat these select individuals differently under the Workers' Compensation laws....) (Emphasis added.) The purpose of the legislation does not have to appear on the face of the legislation or in the legislative history, but may be any possible purpose of which the court can conceive. In this case, the Workers' Compensation Court expected the legislature to provide the purpose. This, however, is not required of legislation being examined relative to equal protection.

Appellant contends that the Workers' Compensation Court ignored the rule that legislation is presumed to be constitutional. Further, it did not require the respondent to meet his burden of proving the statute was unconstitutional. Appellant claims the respondent provided no testimony, no evidence nor any case law to argue that the statute was invalid. Respondent merely argued that the distinction between physical and mental injury claims was nonsensical and unfair.

This Court concludes that the Workers' Compensation Court did not properly apply these rules for analyzing legislation under an equal protection challenge. The Workers' Compensation Court did not presume the statute to be constitutional and look to any possible legitimate purpose for the legislation. However, resolving doubts in favor of the legislation in minimum level scrutiny cases is the proper approach because:

> [i]n the utilities, tax, and economic regulation cases, there are good reasons for judicial self-restraint if not judicial deference to legislative judgment. The legislature after all has the affirmative responsibility. The courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the judges have been overruled by events -- self-limitation can be seen to be the path to institutional prestige and stability.
>
> The Court is aware, too, of its own remoteness and lack of familiarity with local problems. Classification is dependent on legislative purpose. Legislative purpose is dependent on the peculiar needs and specific difficulties of the community. The needs and difficulties of the community are constituted out of fact and opinion beyond the easy ken of the Court.

Joseph Tussman and Jacobus tenBroek, The Equal Protection of the Laws, 37 Cal. L. Rev. 341, 373 (1949). The legislature is simply in a better position to develop the direction of economic regulation, social and health issues.

Neither did the Workers' Compensation Court place a burden upon the respondent to bring evidence forward to show the statute was unconstitutional. In fact, the Workers' Compensation Court looked to the appellant for evidence that the statute was constitutional. "There is not a scintilla of fact, statistical or otherwise to demonstrate any actual cost or cost savings associated with the broad brush of exclusion brought by this legislation." The "heavy burden", however, rests with the party challenging the statute. Kadrmas at 463, 108 S.Ct. at 2490.

Even a cursory glance at the legislative history and statute indicates a concern over the high cost of the Workers' Compensation program to the State of Montana and the employers involved in the program. It is evident that this was the primary purpose for the legislative changes in the Workers' Compensation Act. "[P]romoting the financial interests of businesses in the State or potentially in the State to improve economic conditions in Montana constitutes a legitimate state goal." Meech v. Hillhaven West, Inc. (1989), 238 Mont. 21, 48, 776 P.2d 488, 504. (Citation omitted.) A purpose would

be to provide for injured workers at a reasonable cost.

In addition, there are problems relative to mental stress claims, and they have caused a reluctance in some states to compensate for these claims. As we stated in Erhart v. Great Western Sugar Company (1976), 169 Mont. 375, 379, 546 P.2d 1055, 1057:

> Workmen's compensation cases normally deal with physical injury resulting from an accident, as the term is used in everyday language. When a shipping crate falls on a worker breaking a bone or two, the causation and the tangible happening are easily identifiable. In the present case we are dealing with a nervous disability, which may or may not be causally related to the employment situation.

The exclusion of mental claims rationally relates to the possible goal of reducing costs and having a viable program for the State and the enrolled employers and employees in the workers' compensation field.

Disallowing mental, or stress claims occurring without a physical component, while quite unfortunate for some, does not violate equal protection of the law.

> The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a

> time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others.

Eastman v. Atlantic Richfield Co. (1989), 237 Mont. 332, 339, 777 P.2d 862, 866, citing Williamson v. Lee Optical Co. (1955), 348 U.S. 483, 489, 75 S.Ct. 461, 465, 99 L.Ed. 563. (Citations omitted.) As we have stated in State v. Safeway Stores, Inc., 76 P.2d at 87, to wit:

> On this phase of the question we again quote with approval from the West Coast Hotel Case, supra, wherein the court said: "This Court has frequently held that the legislative authority, acting within its proper field, is not bound to extend its regulation to all cases which it might possibly reach. The legislature 'is free to recognize degrees of harm and it may confine its restrictions to those classes of cases where the need is deemed to be clearest.' If 'the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied.' There is no 'doctrinaire requirement'that the legislation should be couched in all embracing terms."

The concern over problems of administration of the Workers' Compensation program which prompted changes in the 1987 Workers' Compensation legislation might reasonably have called for a cautious approach. As stated in Joseph

Tussman and Jacobus tenBroek, The Equal Protection of the Laws, 37 Cal. L. Rev. 341, 349 (1949):

> [t]he 'piecemeal' approach to a general problem, permitted by under-inclusive classifications, appears justified when it is considered that legislative dealing with such problems is usually an experimental matter. It is impossible to tell how successful a particular approach may be, what dislocations might occur, what evasions might develop, what new evils might be generated in the attempt to treat the old. Administrative expedients must be forged and tested. Legislators, recognizing these factors, may wish to proceed cautiously, and courts must allow them to do so.

Here, it is fairly obvious that the legislature was attempting to improve the financial viability of the system. This, they can do by rational means without violating the equal protection clause. Eastman, 777 P.2d at 866; Williamson, 348 U.S. at 489, 75 S.Ct. at 465.

Applying the general rules for analyzing the constitutionality of a statute under the rational basis test, the Court concludes that the classification at hand rationally relates to a legitimate governmental objective of controlling the costs of the program and providing benefits.

Reversed.

/s/ R.C. McDonough
Justice

We Concur:

/s/ J.A. Turnage
Chief Justice

/s/ John Conway Harrison

/s/ Karla M. Gray

/s/ Frank J. Weber
Justices

Justice Terry N. Trieweiler dissenting.

The language in Article II, Section 4, of Montana's Constitution is simple, plain, and clear. It provides that "[t]he dignity of the human being is inviolable. No person shall be denied the equal protection of the laws." Yet, the purpose served by that language in any society based on equality is absolutely vital. It recognizes that majoritarian rule can at times be harsh, intolerant, and unfair. It recognizes that at times a basic framework of principle is necessary to prevent those with political influence from oppressing those without political influence.

In recent years in Montana, no group has had less political influence and been the subject of more political demagoguery than those unfortunate people injured and disabled during the course of their employment. No group has

had greater influence than those employers, led by the State's newspaper publishers, who consider injured workers an unnecessary business expense and an obstruction to the ever elusive "better business climate" that they seek for the State of Montana.

Sadly, today's decision by the majority sounds the death knell for this critical constitutional protection which powerless people have traditionally relied on courts to enforce.

Based on the majority's decision in this case, discriminatory laws in Montana need have no rational basis in fact so long as a majority of the members of this Court can contrive some speculative basis to support such discrimination.

To understand the human impact of today's decision and of the anti-claimant hysteria that is sweeping this State, it is necessary to know more about the circumstances of Gary Stratemeyer than is evident from the majority opinion.

Stratemeyer is a 41-year-old former deputy sheriff in Lincoln County. He has a wife and a son. In late 1988 or early 1989, he was promoted to the rank of sergeant.

On May 4, 1990, Officer Stratemeyer received a call from the dispatcher who advised him of a reported suicide. Although he had been in law enforcement for eight years, he had never previously responded to a suicide attempt. However, he responded immediately.

On his way to the location where the suicide was reported, Stratemeyer learned that the young girl who had attempted to take her life was still alive. When he arrived at the home where the attempt had occurred, he entered the bedroom where she was located and observed that "there was blood everywhere." Stratemeyer found the victim, a 17-year-old girl, being held by her father who was rocking her back and forth and telling her to keep breathing. Observing that the father was unable to help her, Stratemeyer forcibly took the girl from her father's arms and began administering cardiopulmonary resuscitation. He continued doing so, holding the dying young woman in his arms, until the ambulance arrived. When the ambulance arrived, Stratemeyer carried the girl to a gurney so that she could be transported to the hospital.

After escorting the ambulance to the hospital, Stratemeyer returned to work and was dispatched to an accident. However, before the shift ended, he was informed that the girl had died.

That night, and for several days and nights thereafter, Stratemeyer was plagued by the memory of the dying girl and her father. He second guessed the wisdom of taking the girl from her father's arms during the last moments of her life. He continued to report to work, but began to experience an inability to concentrate and mental disorientation. He became

increasingly distraught and developed emotional problems that interfered with his work and his personal life. He could not sleep, was continuously exhausted, and felt the need to escape the town in which he lived and worked.

Finally, on May 14, 1990, he was taken to the hospital by ambulance in a tearful state where the psychologist who examined him observed that "[h]e was obsessing about the suicide of the young girl, the flashback of her face superimposed on that of his son's, he feared he was going crazy . ..."

Stratemeyer was given a tranquilizer and diagnosed with post traumatic stress disorder.

Prior to the traumatic experience that he had during the course of his employment on May 4, 1990, Stratemeyer was known as an outstanding member of the Lincoln County Sheriff's Department. He was self-sufficient and conscientious. He was capable of supporting himself and his family. He is now markedly dysfunctional, unable to return to work, and unable to function normally in his personal life. His physical symptoms include problems with his stomach, diarrhea, and periodic vomiting. He experiences periodic tingling and numbness in his arms.

His employer does not dispute the nature of his mental injury nor the extent of his disability. Nor is there any doubt

that his injury resulted from an unexpected traumatic incident identifiable by time and place of occurrence, caused by a specific event on a single day and identifiable by the body part affected. The only reason that he is denied compensation for his disability is the fact that his injury is to his mind, rather than to some other part of his body. Had Stratemeyer injured his back while carrying this 17-year-old girl to the ambulance, the consequences to him and his family may have been much less significant. However, Montana's workers' compensation laws would have provided him full medical coverage for his injuries and disability benefits so long as his earning capacity was affected. This type of legislative injustice is exactly what the equal protection clause was intended to prevent. Yet, because of the majority opinion, future Gary Stratemeyers will have no constitutional protection in Montana from similar discriminatory treatment by legislators anxious to please influential constituents.

The majority opinion is the best example yet for the belief by many constitutional scholars that the "rational basis" test is no test at all. Based on the majority opinion in this case, it can clearly be said that the determination of which standard of review applies determines the outcome of any equal protection analysis under Montana constitutional law. Under the majority's "rational basis" standard of review, the

Legislature need offer no reason for its discriminatory classifications. The beneficiary of the discrimination need offer no evidence in District Court that the statutory distinction is rationally related to a legitimate government objective, and the District Court need have no factual or evidentiary basis for upholding discriminatory legislation.

According to the majority opinion, the only limit on the Legislature's authority to draw arbitrary classifications among its citizens is the creative ability of the majority of the justices on this Court. If the majority can imagine some speculative but unsubstantiated basis for discriminating among Montana's citizens, then it is okay for the Legislature to do so. Under this standard, the notion of equal protection in our Constitution is truly illusory.

The major problem with the majority's reasoning is that it proceeds from the faulty assumption that it is limited to a two-tiered analysis of equal protection cases. Limiting the Court's scope of review to a two-tiered analysis has been discredited long ago in both federal and state case law, and for good reason.

As pointed out by Justice Marshall in his dissent in *Massachusetts Board of Retirement v. Murgia* (1976), 427 U.S. 307, 318, 96 S. Ct. 2562, 2569, 49 L. Ed. 2d 520, 527-28 (Marshall, J. dissenting):

> Although there are signs that its grasp on the law is weakening, the rigid two-tier model still holds sway as the Court's articulated description of the equal protection test. Again, I must object to its perpetuation. The model's two fixed modes of analysis, strict scrutiny and mere rationality, simply do not describe the inquiry the Court has undertaken -- or should undertake -- in equal protection cases. Rather, the inquiry has been much more sophisticated and the Court should admit as much. It has focused upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the state interests asserted in support of the classification.

Although the two-tier model employed by the majority offers a simple mechanical approach to equal protection analysis, Marshall very clearly explained the inadequacy of such an approach for enforcing this important constitutional right. He pointed out that:

> If a statute invades a "fundamental" right or discriminates against a "suspect" class, it is subject to strict scrutiny. If a statute is subject to strict scrutiny, the statute always, or nearly always, see *Korematsu v. United States*, 323 U.S. 214 (1944), is struck down. Quite obviously, the only critical decision is whether strict scrutiny should be invoked at all...

> But however understandable the Court's hesitancy to invoke strict scrutiny, all remaining legislation should not drop into the bottom tier, and be measured by the mere rationality test. For that test, too, when applied as articulated, leaves little doubt about the outcome; the challenged legislation is always upheld. It cannot be gainsaid that there remain rights, not now classified as "fundamental," that remain vital to the flourishing of a free society, and classes, not now classified as "suspect," that are unfairly burdened by invidious discrimination unrelated to the individual worth of their members. Whatever we call these rights and classes, we simply cannot forego all judicial protection against discriminatory legislation bearing upon them, but for the rare instances when the legislative choice can be termed "wholly irrelevant" to the legislative goal. *McGowan v. Maryland*, 366 U.S. 420, 425 (1961). [Citations omitted.]

Murgia, 427 U.S. at 319-20.

It is no wonder that in *The Supreme Court 1971 Term -- Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection 86 Harv. L. Rev. 1, 8 (1972)*, Professor Gerald Gunther observed that the Warren Court applied either "scrutiny that was 'strict' in theory and fatal in fact," or "minimal scrutiny in theory and virtually none in fact." The minimal scrutiny applied by the majority in this case was in fact no scrutiny.

Perhaps in response to the legitimate concerns articulated so clearly by Justice Marshall, the U.S. Supreme Court recognized a middle tier of analysis in Plyler v. Doe (1982), 457 U.S. 202, 102 S. Ct. 2382, 72 L. Ed. 2d 786. In that case, the State of Texas denied the children of illegal aliens free public education. The question presented to the Supreme Court was whether that denial was consistent with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. In concluding that the Equal Protection Clause was violated, the majority of the Court recognized that undocumented aliens are not a suspect class and that education is not a fundamental right. Therefore, the discriminatory classification reviewed in that case was not subject to strict scrutiny. However, the Court also recognized that because of the importance of education in the lives of children, and because of the significant social costs when selected groups are denied an education, an intermediate level of scrutiny would be applied. As part of that intermediate level of scrutiny, the Court held that the burden would be on the State of Texas to prove that the discriminatory classification furthered some substantial goal of the State. Finding no evidence in the record of such a substantial interest, the Court held that:

If the state is to deny a discrete group of

> innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest. No such showing was made here. Accordingly, the judgment of the Court of Appeals in each of these cases is *Affirmed*. *Plyler,* 457 U.S. at 230.

In analyzing the circumstances which will give rise to the heightened level of scrutiny applied by the Supreme Court in the *Plyler* decision, Lawrence Tribe offers the following explanation:

> Broadly speaking, there are two circumstances that trigger heightened scrutiny. The first involves infringement of "important," although not necessarily "fundamental," rights or interests. The extent to which the Court's scrutiny is heightened depends both on the nature of the interest and the degree to which it is infringed. Thus, in Plyler v. Doe, the Court adopted a requirement that the state's goal be "substantial" when faced with a classification which served to deprive illegal alien children of any education, an interest which the Court explicitly held to be "important" in "maintaining our basic institutions." Significant in the Court's decision to heighten scrutiny was the risk that such deprivation would serve to "create and perpetuate ... a subclass of illiterates within our boundaries."
>
> Likewise, in *Hampton v. Mow Sun Wong,* infringement of the interest of aliens in

> employment in the federal competitive civil service was struck down specifically because of how broadly the "liberty" of aliens is restricted by their exclusion from such a large part of the economy....
>
> ....
>
> A second broad circumstance in which intermediate review has been triggered involves government's use of sensitive, although not necessarily suspect, criteria of classification.
>
> Lawrence Tribe, American Constitutional Law, § 16-33 (2d Ed. 1988).

Similarly, our Court has recognized a middle tier of analysis where important rights are involved, even though those rights are not considered fundamental. In Butte Community Union v. Lewis (1986), 219 Mont. 426, 430, 712 P.2d 1309, 1311, this Court was asked to decide whether legislation which linked eligibility for welfare benefits to a person's age violated the Equal Protection Clause found in Article II, Section 4, of the Montana Constitution.

We noted that:

> Equal protection analysis traditionally centers on a two-tier system of review. If a fundamental right is infringed or a suspect classification established, the government has to show a "compelling state interest" for its action. If the right is other than fundamental, or the classification not suspect, the government has

> only to show that the infringement or classification is rationally related to a governmental objective which is not prohibited by the Constitution.

We held that to be a fundamental right under Montana's Constitution, the right must be found in Montana's Declaration of Rights or be a right "without which other constitutionally guaranteed rights would have little meaning." *Lewis*, 712 P.2d at 1311. We held that although mentioned in the Constitution, the right to welfare was not a fundamental right. However, since it was an important enough right to be mentioned elsewhere in the Constitution, we held that its abridgement required something more than a rational relationship to a governmental objective. We stated that:

> A need exists to develop a meaningful middle-tier analysis. Equal protection of the law is an essential underpinning of this free society. The old rational basis test allows government to discriminate among classes of people for the most whimsical reasons. Welfare benefits grounded in the Constitution itself are deserving of great protection.
>
> ... Where constitutionally significant interests are implicated by governmental classification, arbitrary lines should be condemned. Further, there should be balancing of the rights infringed and the governmental interest to be served by such infringement.

Lewis 712 P.2d at 1314.

For these reasons, we adopted the following standard of review for those interests which we deemed significant enough to warrant a middle tier of analysis:

> We hold that a finding that HB 843 is constitutional requires the State to demonstrate two factors: (1) that its classification of welfare recipients on the basis of age is reasonable; and (2) that its interest in classifying welfare recipients on the basis of age is more important than the people's interest in obtaining welfare benefits.

Lewis, 712 P.2d at 1314.

Based upon that test, we held in language relevant to the issue raised in this case that:

> [T]he State's objective in enacting HB 843 -- saving money--must be balanced against the interest of misfortunate people under the age of 50 in receiving financial assistance from the State. The trial record does not show the State to be in such a financially unsound position that the welfare benefit, granted constitutionally, can be abrogated.

Lewis, 712 P.2d at 1314.

In *State ex rel. Bartmess v. Board of Trustees of School District No. 1* (1986), 223 Mont. 269, 275, 726 P.2d 801, 804-05, we reaffirmed our commitment to a middle tier of scrutiny and held that a high school student's right to

participate in extra-curricular activities was an interest of sufficient magnitude that its abridgement would warrant middle-tier scrutiny, rather than simply speculation about a rational basis. We stated that:

> We therefore hold that the middle-tier constitutional analysis is to be applied in determining whether the 2.0 rule violates students' right to participate in existing extracurricular activities. We further hold that this right is not a fundamental right under the Montana Constitution; but that such right is clearly subject to constitutional protection and that a middle-tier analysis is to be applied for constitutional equal protection purposes.

Based on our previous decisions, the fact that there is no fundamental right to those disability benefits provided for in the Workers' Compensation Act should not be the end of our equal protection analysis. The interest of an injured worker in a disability benefit with which to sustain himself and his family is of sufficient magnitude that the denial of those benefits based on an arbitrary classification deserves a higher level of scrutiny than is provided for under the majority's toothless "rational basis" test.

The benefits provided for under the Workers' Compensation Act will, in many cases, be the difference between a family's subsistence and its financial ruin. The ability to provide for a family's housing, transportation, food,

and clothing may depend on an injured worker's entitlement to disability benefits. The eligibility for health care expenses alone may be the difference between a family's survival and destruction.

The public policy consideration for workers' compensation benefits is clearly stated in Section 39-71-105(1), MCA, which provides that:

> It is an objective of the Montana workers' compensation system to provide, without regard to fault, wage supplement and medical benefits to a worker suffering from a work-related injury or disease.

The vital importance of a basic disability benefit for injured workers in Montana is so clearly evident as a matter of public policy that all but a few exempt employers are required by law to provide coverage under the Workers' Compensation Act for their employees. Section 39-71-401, MCA. The failure to provide coverage is a felony punishable by ten years in prison and a $50,000 fine. Section 45-7-501, MCA. This requirement is considered so significant to the social and economic well-being of our citizens that employers who fail to carry workers' compensation insurance can be ordered to completely cease operation of their business until they elect to be bound by a compensation plan. Section 39-71-507, MCA. Any employer who fails to comply with an order to cease

operations is guilty of a misdemeanor.

Certainly the interest of an injured and disabled worker in his or her disability benefits is as significant as an alien child's interest in education, the right of other Montana citizens to welfare benefits, and the right of school children to participate in extra-curricular activities. To argue otherwise is to ignore the despair and futility experienced by any family whose primary wage earner has lost the ability to provide his or her family with financial support. To hold otherwise is to ignore the reality that unless disabled workers are compensated for their disability by the industry in whose service they were damaged, the obligation to support these workers and their families falls upon the taxpayers in general who have had no direct benefit from the worker's services, and who have a much less compelling obligation to contribute to that unfortunate family's subsistence.

Under the heightened middle-tier scrutiny that I would apply to the Legislature's arbitrary denial of disability benefits to Gary Stratemeyer, the decision of the Workers' Compensation Court would necessarily be affirmed. Under that level of scrutiny, the burden would be on the State of Montana to show that this discriminatory classification is reasonable and that the State interest served is more important than Gary Stratemeyer's interests in these basic disability benefits. There

is no such evidence in the record before this Court.

No purpose for this discriminatory legislation was offered by the Legislature. No purpose was demonstrated by Stratemeyer's employer in the trial court. The Workers' Compensation Judge was left to speculate without any factual or evidentiary basis to justify treating injuries to the mind differently from injuries to the back or leg.

Since the trial judge found no justification for this discriminatory treatment, the majority has manufactured justifications. The majority speculates that excluding injuries to the mind from coverage under the Workers' Compensation Act might be cost effective. The same could be said for excluding injuries to the left leg, as opposed to the right leg, or excluding injuries to the neck. Presumably, if the Legislature chooses to do so, the majority would have no difficulty finding a rational economic basis for its decision.

The majority's effort to rationalize discriminatory treatment of the claimant is speculative at best. We have no evidence in this record of the frequency of claims for stress prior to the 1987 amendment to the Workers' Compensation Act, nor do we have any evidence of the overall impact that such claims had or would have on the cost of providing workers' compensation coverage to the average employer in Montana. What we do know is that the impact of such an

injury on this claimant has been devastating and that his family's need for disability benefits is desperate.

What we also know from the public information that has been disseminated is that since allegedly "cost saving measures" like this one were enacted in 1987, the unfunded liability of the State Compensation Insurance Fund has quadrupled and rates for workers' compensation coverage for most employers in Montana have increased by 100 percent.[1] There is good reason why the majority has found it necessary to substitute its own speculation for any factual record in this case.

The majority also surmises that a rational basis for excluding mental injuries from coverage under the Workers' Compensation Act may be the fact that mental injuries are more difficult to prove than physical injuries. However, this is a poor case in which to assert that argument. The claimant's injury in this case and the extent of his total disability is uncontested by his employer or its insurer. Neither was there any basis in the legislative history for Section 39-71-119, MCA, to conclude that mental injuries were excluded because of the difficulty proving them. The notion that mental injuries

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[1] Chris Sykes, *A Heavy Toll: What Workers' Comp Costs and How Montana Rates*, GREAT FALLS TRIBUNE. Feb. 14, 1993, at 4A.

are difficult to prove and document is a carry-over from the dark ages. In the modern practice of psychiatry and psychology, there are many objective tests for the documentation and measurement of mental disease or defect. Conversely, in spite of many advances in medicine, there are no objective means of documenting or measuring many types of physical injuries, including injuries to muscles, ligaments, tendons, and nearly every other soft tissue found in the human body.

Any conclusion that difficulties with proof are a justification for excluding mental injuries from coverage under the Workers' Compensation Act finds support only in the editorial pages of this State's daily newspapers which, for the past year, have bullied and threatened this State's courts over the issue presented in this case.[2] These uninformed opinions are certainly no basis for resolving a constitutional issue of the magnitude that this case presents.

The majority opinion is based on an inadequate and faulty analytical approach to the Equal Protection Clause of the

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[2] Editorial, *Stess Could Break Workers' Comp Bank*, GREAT FALLS TRIBUNE, May 19, 1992, at 4A.

Editorial, *Court Cases Add to Work-Comp Woes*, INDEPENDENT RECORD, May 24, 1992, at 5C.

Editorial, *They're Stressed Out in California*, INDEPENDENT RECORD, Jan. 31, 1993, at 5C.

Montana Constitution. It employs an approach which for all practical purposes eliminates the protections provided for in Article II, Section 4, of the Montana Constitution, by concluding that virtually any reason will justify the discriminatory treatment of Montana's citizens under Montana's laws. For these reasons, I dissent from the opinion of the majority. I would affirm the Workers' Compensation Court.

/s/ Terry Trieweiler
Justice

Justice William E. Hunt, Sr. dissenting.

I dissent. Like Justice Trieweiler, I can find no evidence to support the erroneous conclusion of the majority opinion. If giving benefits to a dedicated police officer, injured in the performance of his duty while trying to save the life of a young girl, requires more than claimant has provided here, we are indeed in woeful economic straits.

I would affirm the Workers' Compensation Court.

/s/ William E. Hunt, Sr.
Justice

APPENDIX B:

JUDGMENT OF THE MONTANA WORKERS' COMPENSATION COURT DATED MAY 14, 1992

IN THE WORKERS' COMPENSATION
COURT OF THE STATE OF MONTANA

GARY STRATEMEYER,

Petitioner,

WCC No.: 9112-6322
Area: Kalispell
County: Lincoln
Heard: Feb. 10-11, 1992
Submitted: March 20, 1992

vs.

MACO WORKERS' COMPENSATION
TRUST/LINCOLN COUNTY,

Defendant/Employer.

Presiding Judge: THE HONORABLE TIMOTHY W. REARDON

Counsel of Record:

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ON BEHALF OF THE DEFENDANT/EMPLOYER

* * * * * * * * * * * * *

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT

* * * * * * * * * * * * *

1. Claimant filed a petition to resolve a dispute between himself and the insurer under Title 39, Chapter 71, Part 29, MCA.

2. The Clerk of Court gave notice to interested parties of (a) the time, place and nature ~~of the~~ trial; (b) ~~the legal~~ authority and jurisdiction under which the trial was to be held; (c) the particular sections of the statutes and rules involved; and (d) the matters asserted by notifying all parties who appeared of record to have an interest by mailing to them a copy of the ORDER SETTING TRIAL AND PRETRIAL CONFERENCE with a copy of the PETITION FOR HEARING attached and a copy of the Clerk's Certificate of Mailing the Order and Petition. § 2-4-601, MCA.

3. A pretrial conference was conducted on January 8, 1992, before Clarice V. Beck, Hearing Examiner. The Pretrial Order was docketed on February 4, 1992. Pertinent parts of the Pretrial Order are as follows:

A. STATEMENT OF JURISDICTION:

The Court has jurisdiction of this action pursuant to Section 39-71-2905, MCA.

B. STATEMENT OF UNCONTESTED FACTS:

1. On May 4, 1990, Petitioner Gary J. Stratemeyer was employed by Lincoln County ("Employer") who was insured by MACO Workers' Compensation Trust ("Insurer").

4. Petitioner filed Claim No. 1-90-03997-4.

4. The parties have proposed and the Court adopts the following issues to be determined by the Court:

1. Whether the Claimant suffered a compensable injury under the Workers' Compensation Act arising out of and in the course of his employment.

2. Whether Petitioner is entitled to temporary total disability benefits.

3. Whether Petitioner is entitled to medical and hospital benefits.

4. Whether Petitioner is entitled to an award of reasonable costs and attorneys fees.

5. Whether Petitioner is entitled to an increased award of 20% accrued weekly compensation benefits.

6. Whether Section 39-71-119, MCA, is unconstitutional.

5. The trial in this matter came on February 10-11, 1992, before the Honorable Timothy W. Reardon. James Myers, Craig Martin, Donald H. Bernall, Ed May, Carol Stratemeyer, and claimant Gary K. Stratemeyer were sworn and testified. Exhibits No. 1 through 8 were admitted.

6. The undersigned, having reviewed the pleadings, considered the Pretrial Order and the exhibits admitted into evidence, heard the testimony and observed the demeanor of the witnesses at trial and being fully advised in the premises, now makes the following Findings of Fact and Conclusions of Law and Judgment

FINDINGS OF FACT

1. The uncontested facts are found as fact.

Claimant

2. Claimant, Gary Stratemeyer, is 41 years old. He has been married to Carol Stratemeyer for 18 years. They have one son, now 12 years old.

3. Claimant has completed high school, graduating in 1970. In addition to various skills learned on the job, he graduated from the Montana Law Enforcement Academy in Bozeman, Montana and is certified in welding and small engine

repair. Presently, he is attending the Missoula Vocational Center studying diesel mechanics.

4. Following his graduation from high school in 1970, claimant began work at the St. Regis Lumber Mill where he worked for ten years as a saw filer. Beginning in 1982, he joined the Lincoln County Sheriff's Office as a deputy sheriff (Exhibit No. 4). Claimant worked as a sheriff's deputy until May 1990.

Law Enforcement Employment

5. As a deputy sheriff, claimant performed all of the tasks associated with law enforcement as a patrol officer. He investigated and responded to calls involving bar fights, domestic disputes, traffic accidents (sometimes involving serious injury), traffic violations, breakins, building checks and misdemeanor

offenses. On night shift, he was exposed to physical confrontations on many occasions throughout his career and has had weapons pointed at him.

6. As a law enforcement officer he was expected to respond to all types of calls and circumstances and, in addition to those episodes previously noted, would investigate deaths, both natural and otherwise.

7. Suicide investigation though not a common occurrence would be included as a type of activity to which an officer would be required to respond.

8. Officers Martin and Bernall corroborated claimant's basic description of a law enforcement officer's duties and agreed that "traumatic" episodes are a normal part of the daily routine of law enforcement officers in rendering first aid assistance.

9. Claimant was a patrol officer until approximately late 1988 or early 1989 when he was promoted to sergeant. As sergeant claimant assumed greater administrative duties, including the supervision of other officers. Claimant testified, and the Court finds, that claimant continued to perform most of the patrol requirements along with his administrative duties which reflects an individuals need to feel that he is doing his full share of work.

10. As sergeant, claimant's additional responsibility plus his continued full-time patrol efforts created stress for claimant.

11. During much of his law enforcement career, claimant was actively involved in public relations activity such as McGruff Crime Protection programs in the local schools. It appears he continued these efforts after his promotion to sergeant.

Claim for Compensation

12. On May 4, 1990, Sergeant Stratemeyer was working in the office in Libby. The sheriff's dispatcher called him and advised him of a reported suicide in a housing tract approximately five minutes from his office.

13. Sergeant Stratemeyer immediately went to his patrol car and headed toward the site. Other officers had been dispatched to the scene as well as the local volunteer ambulance crew.

14. Upon arrival at the scene, he was directed into the house of the victim. He proceeded to a back bedroom of the house. Upon entering the bedroom, he found the victim, a 17 year old girl, being held closely by her father. Sergeant Stratemeyer saw the blood which had pooled from a gunshot wound to the victim's head. The victim was still alive when he entered the room. Sergeant Stratemeyer wanted to try to administer appropriate first aid including CPR. To do so he had to take the victim from her father's arms. Having done so, he checked her pulse and respiration. Since she was still alive, there was little more he could do except wait for medical help.

15. When the ambulance crew arrived, Sergeant Stratemeyer helped load the victim on a stretcher and carry her to the ambulance. At trial he testified that he felt the ambulance crew was not moving as fast as they should.

16. Sergeant Stratemeyer, in his patrol car, escorted the ambulance to the hospital where he learned the victim had died of the self-inflicted gunshot wound to her head.

17. Once he finished his work at the hospital, Sergeant Stratemeyer returned to work and was dispatched to an accident scene where there were injuries.

Work After May 4, 1990

18. Sergeant Stratemeyer returned to work on his next scheduled shift and continued on the job for an additional two weeks before going on sick leave.

19. During the period of time from May 4, 1990, until he went on sick leave, Sergeant Stratemeyer was preoccupied with the events surrounding the suicide. He acknowledged being short tempered at work and at home. He was constantly tense and easily agitated.

20. Detective Craig Martin, a co-worker of Sgt. Stratemeyer and Lt. Don Bernall, also a co-worker, substantiated all of claimant's statements concerning the physical scene of the suicide. Both noted the change in claimant after the suicide and Lt. Bernall testified that two weeks after the incident, claimant was ". . . a wreck."

Home Life Before and After May 4, 1990

21. During the course of their 18 year marriage, Gary and Carol Stratemeyer have had some problems. In 1986 they had

counselling sessions with Dr. James Myers a psychologist. In addition, there were some family financial pressures brought about after Carol was injured in an industrial accident. Due to her injuries, she underwent surgery but was unable to return to work. She settled her workers' compensation claim for $27,000 and the family was using some of that money for subsistence and expenses after claimant ceased to work in 1990.

22. Carol Stratemeyer described the claimant as a "good husband" and "good officer" prior to May 4, 1990. After May 4, 1990, she testified that claimant was a "different person." She noted he was easily agitated and upset. He cried easily, had trouble sleeping, and became fearful when his home phone would ring as he did not want to be called in to work. She described him as "obsessed" with an upcoming vacation scheduled for July 1990.

23. Two specific incidents were vividly recalled by Carol. The first was about ten days after the suicide when claimant, Carol, their son and two cousins drove from Libby to Kalispell. On the return trip, the younger kids, including claimant's son began "fighting" in the motor home. Claimant pulled to a stop and began to "whip" his son. Claimant recalls the episode and said that he began to see the face of the young

suicide victim superimposed on his son's face. Claimant felt enormous guilt over this episode.

24. The second event occurred after work, at night, on or about May 15, 1990, and was consistent with claimant's pattern of tension, anxiety, and short temper of the immediate proceeding days. While driving through Libby in his personal car, and exceeding the speed limit, claimant became the subject of a high speed pursuit by law enforcement. Upon learning the identity of claimant and becoming aware of his emotional state, the pursuit was terminated. Later that day, after he had returned home, claimant was taken by ambulance to the local hospital. Claimant remembers little, if any, of the events surrounding the car chase.

Medical/Psychological

25. Claimant and his wife had undergone several sessions of marriage counseling in 1986. Following that the stresses surrounding the marriage were apparently resolved and there is no additional evidence of such problems recurring.

26. Claimant's medical history is relatively uneventful until approximately December 1988. Dr. James Myers, a psychologist authored a report dated May 21, 1990 (Exhibit No. 1) which details claimant's psychological history. The report documents the stress associated with claimant's job and the pressures that were compounded with the promotion to

sergeant. In December 1988, claimant, responding to the stressors in his life, had lost his temper with his son and felt counseling was required. One session was completed.

27. When claimant was taken to the hospital on May 15, 1990, he was initially seen by Dr. Brad Black in the emergency room. Per Exhibit No. 1, page 34, Dr. Black made a diagnosis of "anxiety depression" and referred claimant to Dr. James Myers, a psychologist.

28. Dr. James Myers, Ph.D., Psychology, testified at trial. His records are incorporated in Exhibit No. 1 which includes all relevant medical and psychological records.

29. Following his examination of claimant in the hospital on May 15, 1990, and after subsequent sessions with claimant, Dr. Myers diagnosed claimant as suffering from post-traumatic stress disorder. Prior to the suicide even though claimant had signs of anxiety, depression and anger, Dr. Myers opined that claimant was able to function satisfactorily.

30. In an April 21, 1990 letter to the Administrator of the Public Employees Retirement System regarding claimant, Dr. Myers wrote:

> . . . In my opinion, it is quite clear that shortly after his March, 1989 promotion to Sergeant is the time at which job stress began to effect him, and it was capped by the early May 1990 adolescent suicide he investigated which directly

> led into the Post-traumatic stress disorder and depression from which he currently suffers and prevents him from returning to work. Once again, I wish to emphasize that in my opinion there is no doubt that his present disability is directly duty-related. Under no circumstances do I consider his present disability as being attributable to nonduty related causes.

31. In his opinion, the claimant's post-traumatic stress disorder as diagnosed after the events of May 14, 1990 (car chase), were directly related to the adolescent suicide of May 4, 1990.

32. Dr. Black, in concert with the recommendations of Dr. Myers, had prescribed Elavil, an anti-depressant medication for claimant in May 1990. Dr. Black had previously prescribed Xanax, a tranquilizer.

33. In October 1991, claimant was examined by Dr. L.F. Whitney at the Western Montana Clinic for a general physical exam. At that time, claimant was complaining of headaches ". . . which have been present for approximately one year." Dr. Whitney found no other physical complaints except episodic intermittent constipation and diarrhea.

34. After moving to Missoula with his family, claimant began his psychological treatment with Dr. Jim Parker. He was also examined by Dr. Noel Hoell, a psychiatrist, whose exam was arranged because of claimant's social security

disability application. Dr. Hoell, in his February 7, 1991 report stated in part:

> He described frequent headaches that he said he never used to have. He often has upset stomach. He has frequent diarrhea that he tries to control with diet and over-the-counter agents at times. He described what clearly sounds like occasional panic attacks, often triggered by stimuli, sometimes for no reason at all other than his own thoughts, which include racing heart, feelings of dread, tight feeling in his chest, labored breathing, dizzy and tingling and faint feelings.

Dr. Hoell concurred in the diagnosis of post-traumatic stress disorder and also concluded that claimant was disabled.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this proceeding pursuant to section 39-71-2905, MCA.

2. Claimant did not suffer an "injury" as that term is defined in section 39-71-119, MCA (1987), of the Workers' Compensation Act.

This is a case of first impression under the 1987 amendment to the definition of injury under the Act. In addition to being the first case of this type, it also presents in a dramatic fashion, the philosophic controversy over stress-related workers' compensation claims.

Prior to the change impiemented in 1987, "injury" was defined as:

> (1) a tangible happening of a traumatic nature from an unexpected cause or unusual strain resulting in either external or internal physical harm and such physical condition as a result therefrom and excluding disease not traceable to injury, except as provided in subsection (2) of this section;
>
> (2) cardiovascular or pulmonary or respiratory disease contracted by a paid firefighter employed by a municipality, village, or fire district as a regular member of a lawfully established fire department, which diseases are caused by overexertion in times of stress or danger in the course of his employment by proximate exposure or by cumulative exposure over a period of 4 years or more to heat, smoke, chemical fumes, or other toxic gases. Nothing herein shall be construed to exclude any other working person who suffers a cardiovascular, pulmonary, or respiratory disease while in the course and scope of his employment;
>
> (3) death resulting from injury.

The amended statute, and the one applicable to this claim reads:

> **39-71-119. Injury and accident defined.** (1) "Injury" or "injured" means:

(a) internal or external physical harm to the body;
(b) damage to prosthetic devices or appliances, except for damage to eyeglasses, contact lenses, dentures, or hearing aids; or
(c) death.
(2) An injury is caused by an accident. An accident is:
(a) an unexpected traumatic incident or unusual strain;
(b) identifiable by time and place of occurrence;
(c) identifiable by member or part of the body affected; and
(d) caused by a specific event on a single day or during a single work shift.
(3) "Injury" or "injured" does not mean a physical or mental condition arising from:
(a) emotional or mental stress; or
(b) a nonphysical stimulus or activity.
(4) "Injury" or "injured" does not include a disease that is not caused by an accident.
(5) A cardiovascular, pulmonary, respiratory, or other disease, cerebrovascular accident, or myocardial infarction suffered by a worker is an injury only if the accident is the primary cause of the physical harm in relation to other factors contributing to the physical harm.

Significant to the case at bar are subsections (1)(a), (3)(a) and (3)(b). The claimant predicates his claimed entitlement to workers' compensation to the events that occurred on

May 4, 1990, when he responded to, and assisted at, the suicide of a teenage girl in Libby. His claim for compensation (Exhibit No. 6), contained on the same form of the employer's report of injury, describes the basis of the claim as follows:

> After experiencing several stressful incidents, including the investigation of a juvenile suicide, Deputy Stratemeyer suffered what is referred to in layman's terms as a "nervous breakdown."

The testimony of Dr. Myers, and claimant, as well as the medical records specifically relate the cause of claimant's current disability to the events of May 4, 1990 (the suicide). Claimant meets all the requirements of subsection (2) pertaining to the accident.

The insurer, as part of its defense, argues that a suicide investigation, though rarely undertaken, is nonetheless a "traumatic incident" and not unusual for a law enforcement officer. The Court agrees that a law enforcement officer's duties encompass such a vast array of circumstances that few episodes could be considered an "unusual strain." However, the Montana Supreme Court has consistently held that a strain can be compensable under the term "unusual" from both a cause and effect consideration (See Jones v. Bair's Cafes, 152 Mont. 13, 445 P.2d 923 (1968); Robins v. Ogle, 157 Mont. 328, 485 P.2d 692 (1971); Love v. Ralph's Food Store, Inc., 163 Mont.

234, 516 P.2d 598 (1973).) Nothing in the 1987 legislative history suggests that the legislature intend to effect any change in this statutory construction and accordingly this Court is bound to follow case precedent under the doctrine of *stare decisis*. The Court concludes that subsection (2) of 39-71-119, MCA (1987) is satisfied.

The insurer's primary defense to this claim is that claimant's disability is a stress disorder occasioned by job stress (and other stressors) resulting in a purely mental or emotional disability. Ergo, claimant cannot satisfy the requirements of section 39-71-119(1)(a), MCA (1987), which states:

> "Injury" or "injured" means (a) internal or external physical harm to the body.

No such physical harm occurred in the case at bar.

The claimant contends that subsections (3)(a) and (b) establish compensability. They read:

> (3) "Injury" or "injured" does not mean a physical or mental condition arising from:
> (a) emotional or mental stress; or
> (b) a nonphysical stimulus or activity.

In applying the statute to the case at bar, since it is a case of first impression, the Court must be mindful of the legislative admonitions regarding statutory construction found in section 1-2-101, 102, MCA, which provide:

> **1-2-101. Role of the judge - preference to construction giving each provision meaning.** In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted. Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.

> **1-2-102. Intention of the legislature - particular and general provisions.** In the construction of a statute, the intention of the legislature is to be pursued if possible. When a general and particular provision are inconsistent, the latter is paramount to the former, so a particular intent will control a general one that is inconsistent with it.

Before undertaking an analysis of the legislative intent in the 1987 amendment, one point can be simplified. By utilizing the words embodied by the legislature, the Court can simplify the basis of both the defendant's and claimant's arguments. This can be done by combining subsections (1)(a) and (3) of section 39-71-119, MCA, to read:

> . . . internal or external physical harm to the body does not mean a physical or mental condition arising from:
>
> (a) emotional or mental stress; or
>
> (b) a nonphysical stimulus or activity.

This phraseology becomes important to the understanding of the four basic types of cause and effect circumstances that exist in workers' compensation and further to consider the legislature's understanding of those four sets of possibilities when the law changed in 1987.

In his treatise on Workers' Compensation, Professor Arthur Larson sets forth the four basic categories with specific attention to the last three. His discussion of the three most commonly disputed circumstances is found in section 42.20, Vol. 1B.

	CAUSE	EFFECT
1.	Physical	Physical
2.	Physical	Mental
3.	Mental	Physical
4.	Mental	Mental

The physical-physical is the most common and least controversial type of claim. An example would be a carpenter whose arm is broken by a falling board.

The second type of cause and effect is the physical-mental. An example would be a situation where a worker suffered a physical event such as a car accident, which resulted in little or no physical harm, but which resulted in a severe psychological depression.

The third type of case would be a mental-physical. In this case the causation portion of the equation has no physical component. An example would be a worker whose negligence caused the death of a fellow worker. In response to the event, the worker develops ulcer disease.

The fourth and last classification of cause and effect is the mental-mental case. In this case both the cause and effect lack a physical component. An example would be the same worker as in the mental-physical case who develops a psychological disability as a result of having caused the death of a fellow worker.

In 1987 the legislature was encouraged to minimize or, if possible, eliminate the potential compensability of the mental-mental classification. Though the legislative history is scant, some is available under the history of Senate Bill 315, as presented to the Senate Labor Committee.

Mr. Robert Robinson, at that time the Administrator of the Division of Workers' Compensation, testified before the committee on March 18, 1987. He stated:

> (6a:108) Mr. Robinson stated that injuries are categorized into four areas: a physical event causing a physical result, a physical event causing a mental result, a mental event causing a physical result, and a mental event causing a mental result. Under this legislation the only definition excluded is a mental event causing a mental result, i.e. stress. In the case of a heart attack, a physician would have to make the determination this was work related.

(Minutes of Senate Labor Committee, March 8, 1987, page 8.)

The minutes of the February 14, 1987 Senate Labor Committee, at page 4, cites the testimony of Attorney Mike McCarter, in support of Senate Bill 315 and the new injury definition. He stated:

> This [the new definition of injury] excludes compensation for mental or emotional stress.

At this point it should be noted that the Court recognizes that testimony of proponents and opponents of legislation is not an automatic establishment of legislative intent. However, there is virtually no solid record by legislators directly which offer much guidance. What is known is that the definition as explained and urged by proponents of the language resulted in passage of the bill.

It is against this backdrop that Sgt. Stratemeyer's claim must be considered. Under the pre-1987 definition of injury,

Montana had few cases involving emotional or mental conditions. In Erhart v. Great Western Sugar Co., 169 Mont. 375, 546 P.2d 1055 (1976), the Supreme Court ruled that a claimant who suffered a nervous breakdown because of taunts and insults directed at him by co-workers was not entitled to coverage under the Act. The Court ruled that:

> In the instant case the credible medical evidence is not determinative of an unusual strain, nor is it determinative of the cause of claimant's condition being an industrial accident or injury. The psychiatrist who treated claimant at the Sheridan, Wyoming, V.A. Hospital was, at best, vague and uncertain as to the cause of claimant's schizophrenia. He testified that no one knows for sure the cause of schizophrenia and this particular instance it was not possible to attribute the condition to any particular stress in the life of claimant.

The Court noted however, that neuroses could be found compensable under Montana Law if the causation factor could be established to satisfy the injury definition.

> A tangible happening must be a perceptible happening, Webster's Third New International Dictionary. Some action or incident, or chain of actions or incidents, must be shown which may be perceived as a contributing cause of the resulting injury. This Court has found neuroses compensable, but a tangible, real

> happening must be a cause of the condition. O'Neil v. Industrial Accident Board, 107 Mont. 176, 81 P.2d 688; Best v. London Guarantee & Acc. Co., 100 Mont. 332, 47 P.2d 456; Sykes v. Republic Coal Co., 94 Mont. 239, 22 P.2d 157. Even in Murphy v. Anaconda Co., 133 Mont. 198, 321 P.2d 1094, while we rejected the common law unusual strain test, a tangible happening (usual exertion in pushing a mail cart) was required before death from a pulmonary embolism could be found compensable. In the recent case of Love where a gradual buildup of back pain was found compensable, this Court emphasized two specific incidents of strain were perceptible from the record.
>
> [1] In the instant case, neither claimant nor the medical witness were able to point to one or more tangible, real, perceptible happenings as the sole or contributory cause of claimant's mental condition.
>
> Claimant has failed to carry his burden of proof, thus precluding his qualification for benefits under the statute.

(Erhart, supra at 381.)

As noted previously herein, this claimant's case turns on whether he can establish the physical component of the injury definition. While Mr. Robinson testified that the language set forth in S.B. 315 amending the definition of

injury would exclude only mental-mental cases, it seems clear that the exclusion is greater than that.

Again, we look to the words of the statute itself.

> (1) "Injury" . . . means:
> (a) internal or external physical harm to the body. . . and
> (3) "Injury" . . . does not mean a physical or mental condition arising from:
> (a) emotional or mental stress; or
> (b) a nonphysical stimulus or activity. (Emphasis added.)

§ 39-71-119(1)(a), (3)(a)(b), MCA (1987)

By the clear language of the statute, a physical condition that arises from emotional or mental stresses or non physical stimulus is not compensable under this statute. The Court points this out because there is evidence in the file that as a result of the suicide investigation of May 4, 1990, Sgt. Stratemeyer has suffered stomach problems and associated constipation and diarrhea. While the drafters of the definition may have intended to exclude only mental-mental claims, they also excluded mental-physical claims. Thus, in order to be compensable, Sgt. Stratemeyer's claim must fall within one of the two remaining categories of coverage, i.e. physical-physical or a physical-mental claim. Either way, it appears to

the Court that to be compensable, the causal basis of the claim must be physical.

Again, the Court must look to the statute for guidance.

> (1) "Injury" or "injured" means:
> (a) internal or external physical harm to the body.
>
> (3) "Injury" or "injured" does not mean a physical or mental condition arising from:
> (a) emotional or mental stress; or
> (b) a nonphysical stimulus or [non physical] activity.

(Emphasis added.)

Conversely, to be compensable under subsection (3) a mental or physical condition must arise from a physical stimulus or activity. The logical next question then is whether Sgt. Stratemeyer's suicide investigation constitutes a physical stimulus. The event of May 4, 1990, are obviously not imagined. The mortally wounded young girl, the scene in the bedroom of her home, Sgt. Stratemeyer physically holding the girl's body are all real, established, indeed conceded facts. The use of sight, sound and touch are all sensory acts of a physical nature.

Webster's New World Dictionary, 2nd College Edition defines physical as follows:

> 1. of nature and all matter; natural; mater-ial. 2. of natural science or natural phil-osophy. 3. of or according to the laws of nature. 4. of, or produced by the forces of, physics. 5. a) of the body as opposed to the mind [physical exercise], b) preoccupied with bodily or sexual pleasures; carnal.

Even if the Court were to assume that Sgt. Stratemeyer's act of touching or holding the victim in his lap would satisfy the need for a physical stimulus as the causal portion of the injury, the Court is nonetheless unable to find the requisite ". . . internal or external physical harm" [119(1)(a)] as the effect.

While there is no controversy in the Court's mind as to the proof of the causal connection between the work-related event of May 4, 1990, and claimant's post-traumatic stress disorder, the legislature has deemed such circumstances to be non-compensable.

3. Section 39-71-119, MCA, violates Article II, Section 4, of the Montana Constitution (1972).

The claimant challenges the constitutionality of the injury definition as applied to his claim as being discriminatory and a violation of public policy. The policy challenge is premised on the argument that all employees injured/disabled because of their job should be compensated under the Workers'

Compensation Act. The policy statement of the legislature can be found in section 39-71-105, MCA. It reads:

> **39-71-105. Declaration of public policy.** For the purposes of interpreting and applying Title 39, chapters 71 and 72, the following is the public policy of this state:
>
> (1) It is an objective of the Montana workers' compensation system to provide, without regard to fault, wage supplement and medical benefits to a worker suffering from a work-related injury or disease. Wage-loss benefits are not intended to make an injured worker whole; they are intended to assist a worker at a reasonable cost to the employer. Within that limitation, the wage-loss benefit should bear a reasonable relationship to actual wages lost as a result of a work-related injury or disease.
>
> (2) A worker's removal from the work force due to a work-related injury or disease has a negative impact on the worker, the worker's family, the employer, and the general public. Therefore, it is an objective of the workers' compensation system to return a worker to work as soon as possible after the worker has suffered a work-related injury or disease.
>
> (3) Montana's workers' compensation and occupational disease insurance systems are intended to be primarily self-administering.

> Claimants should be able to speedily obtain benefits, and employers should be able to provide coverage at reasonably constant rates. To meet these objectives, the system must be designed to minimize reliance upon lawyers and the courts to obtain benefits and interpret liabilities.
>
> (4) Title 39, chapters 71 and 72, must be construed according to their terms and not liberally in favor of any party.
>
> **Article II, Section 4. Individual dignity.** The dignity of the human being is inviolable. No person shall be denied he equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.

Any consideration or analysis of a Constitutional challenge must commence with several long standing principles of law. The Montana Supreme Court has, on more than one occasion, discussed these principles in challenges brought under the Workers' Compensation Act.

In McClanathan v. State Compensation Mutual Insurance Fund, 186 Mont. 56, 606 P.2d 507 (1980), the Court initiated its consideration of an equal protection

challenge to the Social Security offset provisions of section 39-71-701, 702, MCA, as follows:

> In our analysis of this issue, we must begin with the proposition that, in challenges of constitutionality, a statute is given a strong presumption of constitutional validity. *State ex rel. Hammond v. Hager*, (1972), 160 Mont. 391, 398, 503 P.2d 52, 56.
>
> "We commence inquiry into the constitutional question with the well-settled rule that when the constitutionality of a statute is under scrutiny, the statute is presumed to be constitutional and that the party attacking it has the burden of proving its invalidity. [Citations omitted.] This presumption of validity applies to all legislative enactments and it is the duty of the Court to resolve all conceivable doubts in favor of validity whenever possible. [Citations omitted.]" *Reeves v. Ille Electric Co.* (1976), 170 Mont. 104, 109, 551 P.2d 647, 650.
>
> The test in equal protection challenges is whether the classification is supported by a rational basis. *Richardson v. Belcher* (1971), 404 U.S. 78, 92 S.Ct. 254, 30 L.Ed.2d 231; *Dandridge v. Williams* (1970), 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed 2d 491. In *State v. Jack* (1975), 167 Mont. 456, 461, 539 P.2d 726, 729, this Court stated:
>
> "Where the challenge extends to the more general legislative classifications, the judi-

> cial inquiry must be limited to determining whether the distinction is justified by a rational basis. Stated another way, we can determine only whether the law has a sufficiently reasonable relation to a proper legislative purpose so as not to be deemed arbitrary. [Citations omitted.] In connection with this standard, a classification having some reasonable basis does not deny equal protection merely because it is not made with precise mathematical nicety or results in some inequality."
>
> In applying the test, this Court must not be concerned with the expediency of the statute:
>
> "What a court may think as to the wisdom or expediency of the legislation is beside the question and does not go to the constitutionality of the statute. We must assume that the legislature was in a position and had the power to pass upon the wisdom of the enactment, and in the absence of an affirmative showing that there was no valid reason behind the classification, we are powerless to disturb it." State ex rel. Hammond v. Hager, supra, at 399, 503 P.2d at 52.

In 1990 the Court again considered an equal protection challenge to a provision of the Workers' Compensation Act excluding certain claimants from lump sum availability and again initiated the discussion noting:

> [1] We must be cognizant, as Champion contends in brief, that in analyzing constitutional challenges, this court has certain boundaries surrounding the power of the Court to determine constitutionality. Among those is the principal of avoiding constitutional questions whenever possible, State ex rel. Hammond v. Hager (1972), 160 Mont. 391, 400, 503 P.2d 52, 57; and an act of the legislature will not be declared invalid because it is repugnant to some provision of the constitution, unless its invalidity is made to appear beyond a reasonable doubt, Shea v. North Butte Mining Co. (1919), 55 Mont. 522, 530, 179 P. 499, 501. The constitutionality of a legislative enactment is prima facie presumed, and every intendment in its favor will be made unless its unconstitutionality appears beyond a reasonable doubt. *T & W Chevrolet v. Darvial* (1982), 196 Mont. 287, 292, 641 P.2d 1368, 1370.

Ingraham v. Champion International, 243 Mont. 42, 793 P.2d 769 (1990).

It is against this recognition of presumed constitutionality that the current challenge must be considered.

As found in the facts, Sgt. Stratemeyer's current disability is total in character. Further, the probative, medical, psychological testimony overwhelmingly establishes the causal connection between his current condition and the events of May 4, 1990, which arose from his job as a deputy sheriff.

Without a doubt, he has satisfied the burden of proof requirements of section 39-71-407, MCA, providing in part:

> (2) (a) An insurer is liable for an injury as defined in 39-71-119 if the claimant establishes it is more probable than not that:
> (i) a claimed injury has occurred; . . . .

Here the proof easily meets the statutory burden.

The classification being challenged consists of those individuals whose disability is proven to be causally related to their employment but for whom benefits are denied because of a lack of physical harm to the body.

Yet another Supreme Court case provides guidance as to the disposition of such classification challenges. In Cottrill v. State Compensation Mutual Insurance Fund, 229 Mont. 40, 744 P.2d 895 (1987), liability was denied for a claim, otherwise compensable, solely on the basis that the legislature excluded family members who live in the employer's (family) home. The Supreme Court discussion begins at page 42 and reads:

> Issue 2. Is sec. 39-71-401(2)(c), MCA, unconstitutional?
>
> Appellant, David Cottrill, argues that sec. 39-71-401(2)(c) violates both the Montana and Federal Constitutions. We agree.

Art. II, sec. 4 of the 1972 Montana Constitution states that

"[T]he dignity of the human being is inviolable. No person shall be denied equal protection of the laws. Neither the State nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas."

This provides for even more individual protection than the comparable Fourteenth Amendment, sec. 1 to the United States Constitution, which provides that: "No state shall make or enforce any laws which shall bridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

States do have the right to make reasonable classifications. *Royster Guano Co. v. Virginia* (1920), 253 U.S. 412, 415, 40 S.Ct. 560, 561, 64 L.Ed. 989, 990. However, "[t]he principal purpose of the Equal Protection Clause, Amend. XIV, U.S. Const., and Art. II, Sec. 4, 1972 Mont. Const., is to ensure that persons who are citizens of this country are not the subject of arbitrary and discriminate state action." *Godfry v. Mont. State Fish & Game*

Com'n (Mont. 1981), 631 P.2d 1265, 1267, 38 St.Rep. 661, 663.

Both parties agree that the right to receive Workers' Compensation benefits is not a fundamental right which would trigger a strict scrutiny analysis of equal protection. See *Shapiro v. Thompson* (1969), 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600. Nor does this statute infringe upon the rights of a suspect class. Examples of fundamental rights are the right of privacy, freedom of speech, freedom of religion, right to vote and the right to interstate travel. Examples of suspect classifications include wealth, race, nationality and alienage. *Oberg v. City of Billings* (Mont. 1983), 674 P.2d 494, 495, 40 St.Rep. 2034, 2036.

When a right determined to be less than fundamental is infringed upon by classification, the test applied by this Court is the rational relationship test. That is, does a legitimate governmental objective bear some identifiable rational relationship to a discriminatory classification. *Godfrey*, 631 P.2d at 1267.

"A classification that is patently arbitrary and bears no rational relationship to a legitimate governmental interest offends equal protection of the laws. (Cites omitted.) As we have previously held, equal protection of the laws requires that all persons be treated alike under like circumstances."

Tipco Corp., Inc. v. City of Billings (1982), 197 Mont. 339, 346, 642 P.2d 1074, 1078.

In the present case there is nothing on the face of the statute to indicate what the state interest may be in excluding from Workers' Compensation coverage the employer's family member employees who reside in the employer's household unless specifically elected by the employer. Nor is there any legislative history from which to glean a possible governmental objective for this classification.

Although this Court could speculate as to why the legislature elected to treat these select individuals differently under the Workers' Compensation laws, no reasonable or readily identifiable state interest is forthcoming to our collective minds.

No employee whose employment falls under the Workers' Compensation Act can personally elect coverage. Section 39-71-410, MCA. Therefore, David Cottrill is dependent upon his father to make an election of coverage for him. With very few exceptions, no other employee must take that involuntary risk. Even uninsured employers are covered in the event of employee injury. Section 39-71-501, et seq.

The class of employees being considered for equal protection purpose under the Constitution are 'members of an employer's family dwelling in the employer's household' sec. 39-71-401(2)(c), MCA, as compared to members of

> an employer's family who do not dwell in the employer's household. If this classification is applied, then an employer's son residing in his father s household is not covered by workers' compensation (absent an election by his father) whereas a son residing in his own dwelling next door to his father's household would be covered. As previously stated, no rational basis for such a distinction is contained in the statute nor has one been present in argument to this Court. We conclude that the statutory classification violates the equal protection clause of the Montana Constitution. Because there has been a failure to demonstrate a rational basis for the infringement of such a constitutionally protected right, we hold that sec. 39-71-401(2)(c), MCA, is unconstitutional.

In the case at bar then, we note the interest to be protected is not a fundamental right subject to a strict scrutiny analysis. *Cottrill, supra; Eastman v. Atlantic Richfield Co.*, 237 Mont. 332, 777 P.2d 862 (1989).

The test then, is whether or not the actions of the State in classifying Sgt. Stratemeyer's mental-mental disability and denying compensation satisfies a ". . . legitimate governmental objective which bears some identifiable, rational relationship to the classification in question." *Cottrill, supra.*

What rational basis exists for denying benefits solely on the basis of the nature of the disability and its cause? The

ability of a claimant to prove, and an insurer to defend against a particular type of claim might give rise to a classification. For example, in Conway v. Missoula Service Co., 205 Mont. 459, 669 P.2d 225 (1983), the inability of medical science to state with any degree of medical probability that an underlying muscular skeletal disorder was aggravated by employment supported a determination of compensability based on a possibility theory. The 1987 burden of proof changes in 39-17-407 would likely preclude recovery today.

Proof problems related to mental stress or emotional considerations have been the subject of legislation in many jurisdictions.

In *Wolfe v. Sibley, Lindsay & Curr Co.* 36 N.Y.S.2d 505 (1975), compensation was awarded to a woman whose immediate supervisor had committed suicide. The claimant had been called by her supervisor and asked to call the police. After doing so, she went to the supervisor's office where she discovered the victim lying in a pool of blood from a self-inflicted gunshot wound to the head. The claimant suffered severe depression as a result and required hospitalization. In awarding compensation, the New York Court of Appeals stated:

> [3] We hold today that psychological or nervous injury precipitated by psychic trauma is

compensable to the same extent as physical injury. This determination is based on two considerations. First, as noted in the psychiatric testimony there is nothing in the nature of a stress or shock situation which ordains physical as opposed to psychological injury. The determinative factor is the particular vulnerability of an individual by virtue of his physical makeup. In a given situation one person may be susceptible to a heart attack while another may suffer a depressive reaction. In either case the result is the same -- the individual is incapable of functioning properly because of an accident and should be compensated under the Workmen's Compensation Law.

Secondly, having recognized the reliability of identifying psychic trauma as a causative factor of injury in some cases and the reliability by identifying psychological injury as a resultant factor in other cases, we see no reason for limiting recovery in the latter instance to cases involving physical impact. There is nothing talismanic about physical impact (cf. *Battalla v. State of New York, supra*; *Ferrara v. Galluchio*, 5 N.Y.2d 16, 176 N.Y.S.2d 996, 152 N.E.2d 249).

We would note in passing that this analysis reflects the view of the majority of jurisdictions in this country and England. (See, e.g., *Baily v. American Gen. Ins. Co.*, 154 Tex. 430, 279 S.W.2d 315; *Carter v. General Motors Corp.*, 361 Mich. 577, 106 N.W.2d

105; *Burlington Mills Corp. v. Cragood*, 177 Va. 204, 13 S.E.2d 291; *Yates v. South Kirkby Collieries* [1910], 2 K.B. 538; see, also, 1A Larson, Workmen's Compensation Law, § 42.23.)

Notwithstanding these considerations the respondents argue that to allow recovery here would be to open the floodgates with no rational way to limit liability. To support this contention they cite *Tobin v. Grossman* (24 N.Y.2d 609, 301 N.Y.S.2d 554, 249 N.E. 2d 419), which refused to extend to third parties a cause of action in torts for psychic injury incurred without impact. This assertion however misses the point.

[4] In the instant case, Mrs. Wolfe was not a third party merely witnessing injury to another, she was an active participant. Mr. Gorman's nervous condition had intensely involved her, to the point of her being required to assume his responsibilities and attempting to comfort him. Not only did she consider his suicide a personal failure but she was an integral part of the tragedy by virtue of his last communication and her discovery of his lifeless body. The feeling on her part that she should have been able to foresee and to prevent the tragedy was undoubtedly a competent producing cause of her incapacitation.

[5,6] Furthermore by seeking to apply the tort concept of foreseeability the respondents disregard the basic policy of workmen's

> compensation which is that if the injury was accidental and arose in the course of employment then recovery should be allowed (1 Larson, Workmen's Compensation Law, § 2). This is not to say that liability should be extended indefinitely, we must consider the record before us in light of the commonsense viewpoint of the average man (*Matter of Masse v. Robinson Co.*, 301 N.Y. 34, 92 N.E. 2d 56). It is enough to say that the claimant was an active participant in the tragedy and as a result suffered disablement, albeit psychological, for which she should be compensated.

In 1990 New York amended its statutory definition of injury. The 1990 definition excluded injuries which are solely mental and based on work-related stress resulting from disciplinary action, work evaluation, transfer, demotion or termination.

Wisconsin too has wrestled with the difficult question of mental-mental claims. In 1983 the Wisconsin definition of injury found in section 102.01 of their statute read in part:

> "Injury" includes mental harm or emotional stress or strain without physical trauma, if it arises from exposure to conditions or circumstances beyond those common to occupational or non occupational life.

In a 1983 case, the Wisconsin Court of Appeals affirmed an award of benefits to a worker who had observed

a co-worker in a manufacturing plant burned severely by molten metal causing the co-worker's hair and clothing to catch fire, and eventually causing his death. In upholding the award of benefits, the Wisconsin Court, like the New York Court acknowledged the difficult proof burdens associated with stress claims. It said:

> [3] That recovery for nontraumatic mental injury in a worker's compensation action can be had, there is no doubt, and the employer admits as much. That was settled in *Swiss Colony, Inc. v. DILHR*, which held that injury includes emotional stress without physical trauma if it arises from exposure to conditions or circumstances beyond those common to everyday life.
>
> The employer, however, contends that witnessing another employee's injury should not be considered an event giving rise to a compensable nontraumatic mental injury as envisioned under *Swiss Colony* and sec. 102.01(2)(c), Stats. It should not be compensable, the employer argues, because witnessing another's injury is a common occurrence of everyday life for employees, especially those in blue-collar jobs. Since it is a common occurrence, although unfortunate, it does not arise from the kind of exposure to conditions or circumstances beyond those common to daily life.

The employer reasons that to allow recovery for mental injury just because an employee witnesses another's hurt would invite malingering and false claims. Plus, there would be no sensible or just stopping point. Laborers might make claims for mental injuries only passively connected to the job, due more to the peculiar psychological makeup of the "bystander" than to anything closely resembling proximate cause. Thus, those preconditioned to the impact of events might react badly to what should be a normal work day occurrence. Since the preconditioned employee is not the fault of the employer, to allow recovery in these situations would be contrary to the policy behind *Swiss Colony*.

The employer's position has arguable merit and has, in fact, been the subject of intense debate in many of this country's jurisdictions. Perhaps the most articulate discussion of the issue can be found in *Wolfe v. Sibley, Lindsay & Curr Co.*, 36 N.Y.2d 505, 369 N.Y.S.2d 637, 330 N.E.2d 603 (1975). Because of the importance of the issue involved, we certified this case to the supreme court on August 4, 1983, but it was denied on August 30, 1983. Despite the arguable merit of the employer's position, however, we are not persuaded.

[4] The employer's argument is too broadly based. We agree that *Swiss Colony* requires more evidence than just witnessing injury to another as a cause of subsequent

mental illness. Conditions must exist above and beyond the great dimensions of day-to-day strain. In our view, this means that compensation should be restricted to those who are active participants in the tragedy -- those who were so involved with the tragedy that they would feel some responsibility or connection with it.

[5] Joseph did not merely witness the accident. He was intensely involved. The deceased was his friend. He felt he could have prevented his friend from obtaining the fateful job. He felt responsible for his death. He felt an integral part of the tragedy. Thus, under *Swiss Colony*, his mental condition was caused by a series of events beyond the commonplace.

The recognized purpose of the Worker's Compensation Act is that every personal loss to an employee incident to the performance of the employer's duties is a mutual misfortune charged to the cost of production. *City of Milwaukee v. Miller*, 154 Wis. 652, 670, 144 N.W. 188, 194 (1913). The fundamental idea upon which liability is imposed is that an injury to an employee, like damage to a machine, is a burden that should be borne by industry and ultimately paid by the consumer.

Just as there are machines which have built-in or preconditioned vulnerability to breakdown, so it is with people. Some people may break down when they are active participants in the tragedy, witness it and feel

> responsible for it; most may not. Whether the employer is blameless for this preconditioned vulnerability is not important. The employer is equally blameless when a machine breaks down. A misfortune of the industry is part of the burden of running a business, whether to a machine or person. The legislature has deemed that this burden be borne by the industry and paid by the consumer. We conclude that where there is proof that a person was an active work-related participant in the tragedy and was not merely a third party witnessing an injury to another and where nontraumatic psychic injury results, compensation is provided for under the Act.

These examples from our sister jurisdictions discuss in depth the cultural or social hesitation to recognize stress caused disability for workers. Indeed it is likely that virtually everyone who starts their workday brings some elements of non work-related stress to the job. Stressors of everyday living such as bill paying, parenting, spousal relationships, etc. are facts of everyday life. Understandably there is difficultly in sorting out which stressors may predominate when an employee alleges that job stress has disabled him or her.

Yet, if this is the rational basis for the classification established under section 39-71-119, MCA, such rationale is not disclosed in either the statute itself or its legislative history. Again, we note the paucity of any specific legislative discourse

regarding the amendment to section 39-71-119, MCA. Some oral testimony and written attachment from supporters and opponents of SB 315 (which encompassed all of the changes to the Act) include the following:

Mr. George Wood, Executive Secretary of the Montana Self Insurers Association, whose written comments submitted to the Senate Labor Committee hearing on February 14, 1987 states in part:

> Physiological and psychological distress while doing your 'usual' work in the usual manner should not be an accident. Neither should the 'unexpected result'. Our real concerns can be addressed without the definitions being as restrictive as contained in Senate Bill 315.

Mr. Robert Robinson, Administrator of the then Division of Workers' Compensation, testified on March 18, 1987, before the House Business and Labor, Workers' Compensation subcommittee regarding SB 315 and stated in part:

> Under this legislation the only definition excluded is a mental event causing a mental result, i.e. stress.

A review of the totality of the legislative history indicate that the overall intent of most of the 1987 legislation

was to reduce employer costs. In and of itself, this may well be a rational basis for reform. However, the Court cannot determine how the classification issue can stand up to the rational basis standard. This is because no costs were discussed anywhere in the legislative history which could meritoriously support the discriminatory result of the statute.

If this same claimant had strained his back lifting the victim to the ambulance stretcher and as a result herniated a disk in his back, there would be no question as to the compensability or the disability both for the back and the post-traumatic stress disorder.

Like the New York and Wisconsin Courts, this Court also understands the potential difficulty that stress-related disability can create in terms of causation. Yet, the fallacy of total exclusion of those disabilities that ". . . arise out of and in the course of his employment. . ." (39-71-407, MCA) is that it ignores the cause entirely. Sgt. Stratemeyer is just as disabled from the events of May 4, 1990, as if he had injured his back. There is, no apparent rational basis for not compensating him.

The Court is also mindful of the fact that unlike pre-existing physical limitations which the employer might be able to protect against by certain safety measures, a pre-existing mental frailty is not typically apparent. Yet Montana like

every other jurisdiction in the United States has always recognized that employers take the employee ". . . as he finds him." Shepard v. Midland Foods, 205 Mont. 146, 666 P.2d 758 (1983). Thus, any pre-existing predisposition to injury is a risk that all employers undertake when hiring. This is not new law in Montana but is long standing.

The fact that events of May 4, 1990, have severely disabled this claimant only, is also not a basis to deny liability. If twenty other officers had responded to this call and none of them had suffered the debilitating result this claimant has, should that disqualify him from benefits? Based on well established, universally recognized tenets of workers' compensation, the answer is "no". This Court routinely sees cases wherein a particular claimant has suffered an injury doing the same job that dozens of fellow employees perform without difficulty. It is common to have nurses aides who have worked for years making beds and assisting patients, and on one particular day suffer a back injury. Simultaneously, fifteen others doing the same work go home with no injury. The same principles apply to the case at bar. The results are the same, it is the nature of the harm that is different.

What the legislation does, in essence, is to classify claimant's by the nature of their disability without any regard to its relationship to employment. It must be remembered that

the fundamental purpose of workers' compensation is to provide compensation and medical benefits for workers disabled due to their job. Workers have no choices in the workers' compensation system as to whether they will be covered, or whether they will be able to recover full legal redress otherwise guaranteed to Montana's citizens in Article II, section 16 of the Montana Constitution (1972). Why then this classification? The insurer argues that cost savings was the basic purpose of most of the 1987 reform of the Act. Indeed, a review of the legislative history would lead to the conclusion that cost savings was the overall primary goal. Certainly that is a legitimate public purpose and well within the purview of the legislature. However, in accomplishing the goal, the classification established must bear some rational basis to that end. There is not a scintilla of fact, statistical or otherwise to demonstrate any actual cost or cost savings associated with the broad brush of exclusion brought by this legislation. Even if there were it would remain a questionable classification, but without any evidence one way or the other, the Court would have to speculate as to the legislature's reasoning. Such speculation is not an appropriate means of considering the constitutionality of legislative acts.

As previously cited in Cottrill, supra, and which bears repeating here:

> In the present case there is nothing on the face of the statute to indicate what the state interest may be in excluding from Workers' Compensation coverage the employer's family member employees who reside in the employer's household unless specifically elected by the employer. Nor is there any legislative history from which to glean a possible governmental objective for this classification.
>
> Although this Court could speculate as to why the legislature elected to treat these select individuals differently under the Workers' Compensation laws, no reasonable or readily identifiable state interest is forthcoming to our collective minds.

If this classification established by the legislature were to withstand scrutiny under these facts and given this legislative history, then the legislature would be free to amend the definition of injury to exclude paraplegic or quadriplegic injuries from compensability solely on the basis of cost.

If there is a rational basis to this classification, it is a mystery to the Court and any reasoning at all seems to hang by the slimmest of threads.

The claimant has been denied the constitutional guarantee of equal protection of his right to workers' compensation solely on the basis of his condition, as a mentally

disabled individual, a violation of Article II, Section 4 of the Montana Constitution.

In reaching this conclusion, the Court explored the ways in which other states have tried to address what has previously been noted as a difficult question. In 81 Am. Jur. 2d § 17 at 717 and Supplement at 246, there is a discussion of cases upholding the state's laws which discriminates against certain classes of workers' compensation claimants. Invariably, however, the classifications are based on the nature of the work or the structure of the employer's business. For example, exemptions from mandatory coverage based on the number of employees has been upheld (*Jeffrey Mfg. Co. v. Blagg*, 235 U.S. 571, 59 L.Ed 364, 359 S.Ct. 167); exempting school districts from mandatory coverage has also been upheld (*Adams v. Petal Municipal Separate School Systems* (1986) 487 S.2d 1329). The Court found no cases wherein the constitutionality of a classification based on the nature of the disability has been challenged or upheld.

The insurer, in its brief, suggests that claimant might well have an equal protection argument if the classification were directed at policemen or law enforcement. The Court disagrees and in fact, it would seem that a classification on that basis may well withstand challenge. The reason being that it

is a classification of exclusion by coverage of employment before injury and not after the fact exclusion of the kind of injury without regard to its work relatedness. Exclusion by employment, as previously noted, has already been held to be constitutional in other states upon a showing of a rational basis for doing so.

Insofar as work-relatedness in the no-fault-concept of workers' compensation, our social and cultural reluctance to equate "mental" conditions to true disability is deep rooted. Few people question the severity of broken bones or severed limbs because we can see it, x-ray it, or stitch it. Yet, there is a reluctance to accept conditions which lack the objective measurement of such instruments as an x-ray.

Simultaneously mental hospitals overflow with patients, and criminal defendants are routinely exonerated of their crime because of a lack of a certain mental capacity.

If a rational basis exists for the classification created by section 39-71-119, MCA (1987), the legislature must provide it. The Court may not speculate to find it. (*Cottrill, supra.*)

As a final consideration, it may well be that the resulting effect of this classification is to raise the equal protection guarantee to the level of a "suspect class." Specifically, a class of mentally or emotionally impaired individuals. A "suspect class" is guaranteed a higher level of

scrutiny when a constitutional equal protection challenge is made. (See generally *Butte Community Union v. Lewis*, 219 Mont. 426, 712 P.2d 1309 (1986). Article II, Section 4 precludes discrimination or a denial of equal protection ". . . on account of race, color, sex, culture, social origin or condition. . . ." (Emphasis added.) In the case at bar, claimant has been denied compensation based on the nature of his disability without regard to its cause as being work-related. If indeed a higher level of scrutiny is applicable under a constitutional analysis, it is not apparent based on the legislative history.

4. The conduct of the insurer was not unreasonable and no penalty is due.

An insurer can hardly be penalized for successfully denying a claim based on the statutes even though the statute itself has been found unconstitutional. To impose a penalty under such circumstances would be improper.

5. Claimant is not entitled to recover attorney fees as no penalty for unreasonable conduct is warranted.

Section 39-71-611, MCA, requires that a penalty for unreasonable conduct be imposed in order to award fees against an insurer. In the case at bar, the insurer was not found to have acted unreasonably, thus no penalty is due.

6. Claimant is entitled to recover reasonable costs for the pursuit of this claim.

JUDGMENT

1. This Court has jurisdiction over this matter pursuant to section 39-71-2905, MCA.

2. Claimant did not suffer an injury as defined in section 39-71-119, MCA.

3. Subsections (3)(a)(b) of section 39-71-119, MCA (1987) violates Article II, Section 4 of the Montana Constitution and denies claimant equal protection of the law without a rational basis.

4. Claimant is not entitled to a penalty as the insurer did not act unreasonably in its denial of liability.

5. Claimant is entitled to recover reasonable costs but not attorney fees pursuant to section 39-71-611, MCA.

6. This is certification that the JUDGMENT herein is certified as final for purposes of appeal.

7. Any party to this dispute may have 20 days in which to request a rehearing from these Findings of Fact and Conclusions of Law and Judgment.

DATED in Helena, Montana, this 14th day of May, 1992. (SEAL)

/s/ Timothy W. Reardon
JUDGE

CERTIFICATE OF MAILING

I hereby certify that I served upon the persons whose names appear below the attached FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT.

WCC No. 9112-6322

Ms. Sydney E. McKenna
Attorney at Law
103 South 5th East
Missoula, MT 59801

Mr. Norman H. Grosfield
Attorney at Law
P.O. Box 512
Helena, MT 59624-0512

by depositing a true copy thereof in the United States mails, postpaid, addressed to each as listed above.

DATED in Helena, Montana, this 14th day of May, 1992.

PATRICIA J. KESSNER
Clerk of Court

By:/s/ Clara Wilson
Deputy Clerk of Court

APPENDIX C:

THE MONTANA SUPREME COURT'S ORDER DENYING REHEARING DATED JULY 16, 1993

C-1

IN THE SUPREME COURT OF THE STATE OF MONTANA

92-376

GARY STRATEMEYER,	)	
	)	
Claimant and Respondent,	)	
	)	
v.	)	ORDER
	)	
LINCOLN COUNTY,	)	
	)	
Employer,	)	
	)	
and	)	
	)	
MACO WORKER'S COMPENSATION TRUST,	)	
	)	
Defendant and Appellant.	)	

The Petition for rehearing is denied.

DATED this 16th day of July, 1993.

/s/ Justice Turnage
/s/ Justice Harrison
/s/ Justice McDonough
/s/ Justice Gray
/s/ Justice Weber

Justice William E. Hunt, Sr., would grant a hearing.

APPENDIX D:

MONTANA WORKERS' COMPENSATION COURT'S ORDER DENYING REHEARING DATED JULY 8, 1992

D-1

IN THE WORKERS' COMPENSATION COURT
OF THE STATE OF MONTANA

GARY STRATEMEYER,

Claimant, **WCC No. 9112-6322**

vs.

MACO WORKERS' COMPENSATION TRUST/LINCOLN COUNTY,

Defendant/Employer.

ORDER ON PETITION FOR REHEARING

The insurer MONTANA ASSOCIATION OF COUNTIES WORKERS' COMPENSATION TRUST (MACO) filed a REQUEST FOR REHEARING OR MOTION TO AMEND FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT following the entry of the original Judgment on May 14, 1992. The insurer's petition was timely filed and the parties have filed their respective briefs and the insurers post-trial motions are deemed submitted.

Specifically, the insurer seeks relief from that portion of the May 14, 1992 Judgment which held:

3. Subsections (3)(a)(b) of section 39-71-119, MCA (1987) violate Article II Section 4 of the Montana Constitution

and denies claimant equal protection of the law without a rational basis.

ARM 24.5.344 is this Court's procedural rule pertaining to new trial requests. It reads:

> 24.5.344 PETITION FOR NEW TRIAL AND/OR REQUEST FOR AMENDMENT TO FINDINGS OF FACT AND CONCLUSIONS OF LAW (1) After a trial, the court will issue an order or will issue findings of fact and conclusions of law and judgment setting forth the court's determination of the disputed issues. A party to the dispute may petition for a new trial or request amendment to the court's findings of fact and conclusions of law within 20 days after the order or judgment is served.
>
> (2) If a petition for a new trial or request for amendment is filed, the party requesting the new trial or amendment shall set forth specifically and in full detail the relief requested. An opposing party will have 10 days from the date of service pursuant to ARM 24.5.303(3) to respond.
>
> (3) If a petition for a new trial or request for amendment is filed, the original order or judgment issued by the court shall not be considered the final decision of the court pending the denial or granting of the new trial or amendment.
>
> (4) If a new trial is granted, the matter will be scheduled for trial pursuant to ARM 24.5.310. The matter will be determined by the testimony taken at the initial trial and at the new

trial. After the new trial, the court will issue an order or findings of fact and conclusions of law and judgment setting forth the court's determination of the disputed issues.

The granting of such relief is discretionary and the Court has looked favorably to the Rules of Civil Procedure in considering whether a new hearing should be granted. Though the MRCP are not controlling, their guidance has been approved by the Supreme Court. Moen v. Peter Kiewit & Sons' Co., 201 Mont. 425, 655 P.2d 482 (1982). Rule 59 reads:

Rule 59. New Trials -- amendment of judgment

Rule 59(a). Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues for any of the reasons provided by the statutes of the state of Montana. A motion for new trial shall state with particularity the grounds therefor, it not being sufficient merely to set forth the statutory grounds, but the motion may be amended, upon reasonable notice, up to and including the time of hearing the motion.

On motion for a new trial in an action tried without a jury, the court may take additional testimony, amend the findings of fact and conclusions of law or make new findings and conclusions, set aside, vacate, modify or confirm any judgment that may have been entered or direct the entry of a new judgment.

The statutes referred to in Rule 59 are § 25-11-103 and 25-11-102, MCA which read respectively as follows:

> **25-11-103. Grounds after trial by the court.** No new trial may be granted in cases tried by the court without a jury, except on the grounds mentioned in subsections (1), (3), and (4) of 25-11-102.
>
> **25-11-102. Grounds for a new trial.** The former verdict or other decision may be vacated and a new trial granted on the application of the party aggrieved for any of the following causes materially affecting the substantial rights of such party:
>
> (1) irregularity in the proceedings of the court, jury, or adverse party or any order of the court or abuse of discretion by which either party was prevented from having a fair trial;
>
> (2) misconduct of the jury. Whenever any one or more of the jurors have been induced to assent to any general or special verdict or to a finding on any question submitted to them by the court by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors.
>
> (3) accident or surprise which ordinary prudence could not have guarded against;
>
> (4) newly discovered evidence material for the party making the application which he could not, with reasonable diligence, have discovered and produced at the trial;

> (5) excessive damages appearing to have been given under the influence of passion or prejudice;
>
> (6) insufficiency of the evidence to justify the verdict or other decision or that it is against law;
>
> (7) error in law occurring at the trial and excepted to by the party making the application. (Emphasis added).

//

It is against this backdrop that the insurer's motion must be considered. The insurer has raised a multitude of grounds which it argues entitles it to a new trial. In essence, they can be summarized as follows:

> The insurer argues that it should be permitted to call witnesses on the fact determinations inherent in an equal protection claim.
>
> The insurer appears to claim surprise that the Court would rule on the constitutional question because claimant had not timely plead or factually proved it.
>
> The insurer contends that the claimant's brief on the constitutional issue was not sufficient to support the result and the Court improperly went beyond the brief in the legal analysis of the issue.
>
> The Court would reach a different legal conclusion if the insurer were allowed to introduce

witness evidence on the equal protection argument.

The Court utilized an improper level of scrutiny, going beyond the "rational basis" standard.

The Court has reached a decision which essentially rules all work related disabilities compensable thereby intruding into the legislative discretion on coverage.

[Note: These are not quotes of the issues as framed by the insurer but encompass those issues and include a broad scope of consideration.]

As to the statutory requirements pertaining to new trials, it seems clear that the insurer fails to satisfy any of the requirements for granting a new trial. The insurer does not argue that there was any irregularity in the trial which prevented either party from having a fair trial (§ 25-11-102(1), MCA). The insurer does not argue that there is newly discovered evidence which could not previously have been discovered (§ 25-11-102(3), MCA). As to the question of "surprise", it seems clear that the surprise, if any, was not as to any issue or evidence as contemplated by section 25-11-102(3), MCA but rather the result.

On the face of the petition, the insurer does not fit within any of the criteria to grant the requested relief.

Nonetheless, given the obvious and genuine concerns raised by the insurer, as well as the concern voiced in the media coverage of this decision, the Court believes that a response to the issues raised by the insurer is appropriate.

As to any claimed "surprise" over the pleading of the constitutional issue, the Court notes that the constitutionality issue was raised at the time of the pretrial conference on January 8, 1992. Further, the attorney general was notified of the constitutional challenge on January 10, 1992. Finally, the signed pretrial order, clearly reflects the parties acknowledgement that the law's constitutionality was being challenged. There was no surprise.

As to any argument relating to the quality or sincerity of the legal brief filed by claimant, the Court would point out that ARM 24.5.336 of the Court rules provide that the filing of briefs, and proposed Findings of Fact and Conclusions of Law is discretionary. It reads:

> 24.5.336 FINDINGS OF FACT AND CONCLUSIONS OF LAW AND BRIEFS (1) The court may require briefs or other documents to be filed by either or both parties. (2) The court may require either or both parties to file findings of fact and conclusions of law. Requests that a decision not be certified as final pursuant to ARM 24.5.348(3) should ordinarily be included in the proposed findings of fact and

> conclusions of law, with the basis for the request set forth.
> (3) Briefs and findings of fact and conclusions of law will be filed at a date set by the judge or hearing examiner.
> (4) Briefs and findings of fact and conclusions of law may not be filed after the due date except by stipulation of the parties or leave of court. (Emphasis added).

Even if such a filing were mandatory, the Court would nonetheless be required to independently consider and determine the issue. One would hope that reaching the correct result in a litigated dispute would not turn solely on the quality of a counsel's brief.

The insurer argues that there was insufficient factual evidence to support the claimant's equal protection challenge and that there is a rational basis for the classification established by the statute. As to the former, the Court believes that claimant factually established a prima facie case as to his unequal treatment under the law. He proved he was disabled due to a specific work related event and was denied benefits because he lacked a "physical" component to his claim.

As to the insurer's assertion that there is a rational basis for the classification, the Court would again note that the insurer should have introduced such evidence at trial if it existed. However, the Court has again considered the entirety

of the legislative history in light of the insurer's argument. Aside from the broad, sweeping references to cost control in the legislative history, there is no specific discussion of cost in the context of stress. Indeed, the closest any such legislative history comes appears in the minutes of the February 19, 1987 Senate Labor and Employment Subcommittee where the discussion was between keeping heart attacks within coverage, and stress excluded solely on the basis of cost without any consideration of its work relationship or causal basis. Heart attacks remain compensable. As noted in the original decision, there is not one scintilla of fact regarding the costs associated with stress, or what might be saved, or how it relates to other disabilities. If cost, in that broad context, passes constitutional muster then Montana's workers have a bleak future insofar as the protection of the Workers' Compensation Act is concerned.

The insurer does raise a serious concern which the Court feels obliged to address. That is, whether this decision eradicates any employer limitations as to employee claims. In this regard, the Court believes the insurer has misapprehended not only the scope of the decision but also its constitutionally based result. To leave no doubt as to the Court's reasoning, the following example can best illustrate, not only the constitutional infirmity, but also the result of the decision for the insurer.

In this illustration, officer A essentially represents the claimant in the instant case. In order to effectively demonstrate the unconstitutional classification, the hypothesized officer B is added.

> [Deputy Sheriff's A and B were engaged in their normal duties for Lincoln County on May 4, 1990 when they were notified, via police radio, of a reported suicide on the outskirts of town. Both deputies were immediately dispatched to the scene. Upon arrival, A and B were directed to a home just off the road. Upon entering the house, A and B were led down a narrow hallway to a back bedroom. Upon entering the bedroom both deputies observed a man sitting on the floor cradling the head and shoulders of a young girl in his lap. The man was clearly distraught and upset. He was "talking" to the near lifeless form in his hands. The victim was a young girl with an obvious wound to the right side of her head. Blood was on the floor and flowing from the wound.
>
> A and B, being trained in first aid, wanted to administer first aid to the victim but to do so required taking her from her father who resisted letting go. Finally A was able to take the victim, check her pulse and ascertain she was still breathing. With little else to do until medical personnel arrived, A held the victim in his arms. In the process his shirt, pants and forearms were bloodstained. After what seemed like a prolonged period of time but which was

actually only minutes, other officers and medical personnel arrived. A and B helped put the victim on a stretcher and carried her to the waiting ambulance. In the process B felt a sharp pain in his low back when lifting the stretcher.

When the victim was put in the ambulance, A and B escorted the ambulance to the hospital. Within a short time, A and B were informed that the young victim died. A and B completed their paperwork and returned to their duties.

That night A had trouble sleeping as he was being constantly reminded of the suicide episode. Over a period of 10 days he became preoccupied about the event. He had trouble sleeping, was easily angered and equally easily brought to tears. His wife and fellow officers described him as a "changed man." In this same period A had occasion to reprimand his typically, mischievous 12 year old son, but in a fashion far disproportionate to the child's offense. A testified that when physically punishing his son he saw the face of the suicide victim superimposed on his son's face. Over the 10 days, A's anxiety continued to build until the night of the 10th day when he left the house, visibly upset and drove off in his car. As he sped through town local law enforcement began to pursue A's speeding car but he would not stop. Upon learning the identity of the speeder the law enforcement officers stopped the chase. When A finally came home very upset and nervous he was

taken to the hospital. He recalled none of the prior night's events.

A was diagnosed as suffering from post-traumatic stress disorder attributed to the event of May 4, 1990, the suicide. He was taken off work, determined to be totally disabled and has not returned to work and cannot ever return to law enforcement work.

B also continued working after the May 4 incident. Over the next 10 days his back pain progressively worsened until finally he went to a local physician. The doctor diagnosed a ruptured invertebral disk which he related to the lifting of the stretcher at the scene of the May 4 suicide. B was taken off work by the doctor, operated on and is not able to return to work in law enforcement.

Both A and B file workers' compensation claims. The insurer accepts liability for B's claim. Weekly compensation is begun allowing B a check every two weeks to make house payments, buy food and clothing, pay utility bills and provide a relatively normal life for his family. In addition, his surgery and ongoing medical care is paid for.

A's claim is denied solely because his claim lacks a physical component to his disability, which is a diagnosed post-traumatic stress disorder. He and his family receive no benefits for house payments, food, clothing, utility bills

or daily living expenses. In addition, he has no paid medical care.]

This in essence reflects the actual discrimination established by the classification resulting from § 39-71-119(3), MCA as it excluded "stress" claims from coverage. The initial Judgment concluded that this unequal treatment, or in the language of the constitution, unequal protection, violated A's constitutional right to be treated equally by the State. In reaching this conclusion, the Court applied long standing principles of constitutional law. That is, that where a citizen is denied equal protection of the law, at a bare minimum, he is entitled to know why. Against the enormous power of the State, its citizens have but one source of protection or means to keep government in check. That is the Constitution and its Bill of Rights.

While government may classify and discriminate against its citizens, it may do so only upon demonstrating an identifiable, rational, reason for doing so. Cottrill v. State Compensation Mutual Insurance Fund, 229 Mont. 40, 744 P.2d 895 (1987)

Sgt. Stratemeyer and others like him have no "fundamental right" to compensation but they have a right to

be treated equally by social insurance programs until such time as the State can explain why they should not be treated equally.

As was noted in the original decision, exclusionary classification based on types of employment has been held constitutional. Different benefit entitlements between occupational injuries and disease have also withstood constitutional challenge Eastman v. Atlantic Richfield Co., 237 Mont. 332, 777 P.2d 862 (1989). Such is not the case here.

Contrary to some of the media stories concerning this decision, it does not mean that all employees suffering stress are entitled to workers' compensation. It means that all employees who can prove that their stress related condition is caused by their employment are entitled to the same benefits afforded workers physically disabled because of their employment until the State puts forth a legitimate, identifiable, rationale reason why they should not be.

There is nothing in this decision which should in any way be construed to lessen the proof requirements for stress claims versus any other claim, nor have the other requirements of § 39-71-119, MCA been in any way abrogated. Claimants must still satisfy those requirements of 119(2) requiring an accident (identifiable by a time, place and specific event on a single work shift). The overwhelming evidence in this case satisfied all those requirements.

The defendant's petition/motion does not meet any of the criteria for granting a new trial and accordingly, defendant/insurer's motion is **DENIED**.

DATED in Helena, Montana this 8th day of July, 1992.

(SEAL)

/s/ Timothy W. Reardon
JUDGE

CERTIFICATE OF MAILING

I hereby certify that I served upon the persons whose names appear below the attached ORDER ON PETITION FOR REHEARING.

WCC No. 9112-6322

Ms. Sydney E. McKenna
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by depositing a true copy thereof in the United States mails postpaid, addressed to each as listed above.

DATED in Helena, Montana, this 8th day of July, 1992.

PATRICIA J. KESSNER
Clerk of Court

By: /s/ Clara Wilson
Deputy Clerk of Court